TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 655

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL., ETC., PETITIONERS,

vs.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 27, 1940.

CERTIORARI GRANTED FEBRUARY 3, 1941.

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 655

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,

Petitioners,

vs.

INGRAM - RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BLANK PAGE

INDEX.

BLANK PAGE

TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellee,

7198 *vs.*

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,
Defendants-Appellants.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellant,

7199 *vs.*

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,
Defendants-Appellees.

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

TRANSCRIPT OF RECORD FILED JAN. 16, 1940.
PRINTED RECORD.

BLANK PAGE

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellee,

7198 *vs.*

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,
Defendants-Appellants.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellant,

7199 *vs.*

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, ETC.,
Defendants-Appellees.

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

BLANK PAGE

INDEX.

TRANSCRIPT OF EVIDENCE.

BLANK PAGE

1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court. Placita.

Ingram - Richardson Manufacturing Company
vs.
Department of Treasury of the State of Indiana, *et al.*
} No. 63, Civil.

Be It Remembered that heretofore to wit: at the November Term of said Court, on the 15th day of March, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above cause were had, to wit:

Comes now the plaintiff by its attorneys, and files complaint in the above entitled cause, which is as follows:

Filed Mar. 15, 1939.

IN THE UNITED STATES DISTRICT COURT,

Southern District of Indiana,

Indianapolis Division.

Ingram-Richardson Manufacturing Company of Indiana, Inc,
Plaintiff,

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana,
Defendants.

Cause No. 63. Civil.

COMPLAINT FOR REFUND OF GROSS INCOME TAX.

Filed March 15, 1939.

Plaintiff complains of defendants and alleges that:

1. Jurisdiction is founded on the existence of a federal question and amount in controversy. Of the tax sought to be recovered herein, the assessment of $5,410.20, excluding interest, was illegal because of Article I, Section 8, of the Constitution of the United States, and the assessment of the balance of $1,154.28, excluding interest, was illegal for the reason hereinafter set forth. The matter in controversy, exclusive of interest, and costs, exceeds the sum of $3,000.00.

2. Plaintiff is an Indiana corporation, whose principal place of business is at Frankfort, Indiana. Defendant Department of Treasury of the State of Indiana is an executive department of said state vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana
3 Gross Income Tax Act of 1933 (Chap. 50, Acts of 1933, as amended by Chap. 117, Acts of 1937). Defendants M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson constitute the Board of Department of Treasury of the State of Indiana.

3. On July 1, 1938, defendant Department of Treasury notified plaintiff that said defendant proposed to assess an additional tax against plaintiff in the amount of $6,564.48 for the second, third and fourth quarters of 1937, and on or about July 14, 1938, plaintiff filed with said defendant a written protest against such proposed assessment and fully stated therein the grounds of such protest. A hearing on such protest was thereafter held by defendant Department of Treasury but on or about February 13, 1939, said defendant denied said protest and ruled against plaintiff with respect thereto.

4. On February 16, 1939, defendant Department of Treasury assessed against plaintiff said additional tax and issued a notice and demand to plaintiff therefor, together with interest in the amount of $613.13, totaling $7,177.61, which total amount plaintiff paid on February 20, 1939.

5. On February 23, 1939, plaintiff, on a form prescribed by the defendant Department of Treasury filed with said defendant its verified petition for a correction of the amount so paid by plaintiff to said defendant, and for a refund thereof. In said petition plaintiff set forth the amount which it claimed should be refunded and the reasons for such claim. Said defendant denied said claim and petition on February 23, 1939, and on said date notified plaintiff in writing of such denial. Defendants have refused to pay to plaintiff any part of or all said additional tax.

6. Of the aforesaid additional tax, excluding interest, $5,410.20 was based upon plaintiff's receipts from its
4 customers outside Indiana, and the balance of $1,154.28 was based upon plaintiff's receipts from its customers in Indiana. All said receipts arose out of the following course of transactions:

Plaintiff owns and operates a manufacturing plant at Frankfort, Indiana. Plaintiff is, and during 1937 was, engaged in enameling parts used by manufacturers of stoves, refrigerators and other products. Plaintiff's traveling salesmen solicited and negotiated orders from such manufacturers in various states. The original purchase order forms delivered to plaintiff by such manufacturers were the same forms used generally by them for the purchase of materials. After plaintiff accepted these purchase orders, the stove, refrigerator or other parts, all of plain, unenamelled metal, were transported, ordinarily by plaintiff's trucks, from the respective manufacturers' plants to plaintiff's plant and were there enamelled by plaintiff.

Such enameling was essentially a manufacturing process, and required large, expensive ovens and machinery and extensive labor whereby vitreous materials were added to and fused with the plain metal parts furnished by such other manufacturers. There resulted enamelled and highly polished articles which were then transported, likewise in plaintiff's trucks, to such other manufacturers for assembly into the finished products. Plaintiff thereafter billed such manufacturers for the prices of the enamelled parts and remittances on such billings were made by mail.

The value of the plain metal parts furnished by such manufacturers was in each instance very considerably less than the value thereof after plaintiff, by the addition of materials and performance of labor as aforesaid, enamelled such parts. In most instances such latter value was at least 300% of the former.

5 7. The aforesaid assessment was illegal, and plaintiff is entitled to recover it because

(a) plaintiff's receipts upon which $5,410.20 of said assessment is based were from sales in interstate commerce, and as applied to such receipts, said Gross Income Tax Act and the assessment of said amount constitute a regulation of and burden upon interstate commerce in violation of Article I, Section 8 of the Constitution of the United States; and

(b) plaintiff's receipts upon which $1,154.28 of said assessment is based were from wholesale sales as defined in the aforesaid act (Acts 1937, Chap. 117, Sec. 3, a-3) and were therefore taxable at the rate of ¼ of 1 per cent, as originally returned and paid by plaintiff, instead of 1 per cent, as assessed by defendant Department of Treasury.

Wherefore, plaintiff demands judgment against defendants for $7,177.61, interest, costs, and all other proper relief.

Earl B. Barnes,
Charles M. Wells,
Attorneys for Plaintiff,
Fletcher Trust Building,
Indianapolis, Indiana.

Barnes, Johnson & Wells,
Fletcher Trust Building,
Indianapolis, Indiana.
Of counsel.

6 And afterwards to wit at the November Term of said Court, on the 5th day of April, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Apr. 5, 1939.

Come now the defendants by their attorneys and file answer, which is as follows:

7 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—63) * *

ANSWER.

Come now the defendants, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson as and constituting the Board of Department of Treasury of the State of Indiana, and for answer to the plaintiff's complaint herein state:

1. The defendants admit so much of the paragraph designated as "1" of the plaintiff's complaint as alleges that the jurisdiction is founded on the existence of an alleged federal question and the amount in controversy, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000) and is in the amount of five thousand four-hundred ten dol-

8 lars and twenty cents ($5,410.20); but the defendants deny the allegation that the gross income taxes sought to be recovered in this action were illegally assessed and collected in view of the provisions of Article I, Section 8, of the Constitution of the United States of America, and deny that the Gross Income taxes sought to be recovered in this action were illegally assessed and collected for any reason whatsoever.

2. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "2" as alleges that the plaintiff is an Indiana corporation, whose principal place of business is at Frankfort, Indiana, and that the defendant, Department of Treasury of the State of Indiana, is a department of the State Government of Indiana created by Chapter 4 of the Acts of the General Assembly of Indiana of 1933, to which department has been assigned by executive order of the Governor of the State of Indiana the enforcement of the provisions of Chapter 50 of the

Acts of the General Assembly of the State of Indiana of 1933 as amended by Chapter 117 of the Acts of the General Assembly of Indiana of 1937, which act is commonly known and designated as the Indiana Gross Income Tax Act, and that the defendants, M. Clifford Townsend as Governor of the State of Indiana, Joseph M. Robertson as Treasurer of the State of Indiana, and Frank G. Thompson as Auditor of the State of Indiana, together constitute the Board of the Department of Treasury of the State of Indiana.

3. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "3" as alleges that on July 1, 1938, the defendant, Department of Treasury, notified the plaintiff that said defendant proposed to assess as an additional tax against plaintiff the amount of six thousand five-hundred sixty-four dollars and forty-eight cents ($6,564.48) for the second, third, and fourth quarters of 1937, and that on or about July 14, 1938, the plaintiff filed with the said defendant a written protest against such proposed assessment and stated therein the grounds of such protest, and that thereafter a hearing was held by the defendant Department of Treasury, and on or about February 13, 1938, the said defendant, Department of Treasury, denied the said protest of the plaintiff and ruled against the plaintiff with respect thereto.

4. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "4" as alleges that on February 16, 1939, the defendant Department of Treasury assessed against the plaintiff said additional tax and issued a Notice and Demand to the plaintiff therefor, together with interest in the amount of six-hundred thirteen dollars and thirteen cents ($613.13), making a total of seven-thousand one-hundred seventy-seven dollars and sixty one cents ($7,177.61) and that the plaintiff paid such amount to the defendant Department of Treasury on February 20, 1939.

5. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "5" as alleges that on February 23, 1939, the plaintiff on a form prescribed by the defendant Department of Treasury filed with said defendant its verified petition for a correction of the amount so paid by the plaintiff to the said defendant and requesting a refund of such amount, and that in the said petition the plaintiff set forth the amount which it claimed should be refunded and the grounds upon which it relied for such

claim; thereafter on February 23, 1939, the defendant Department of Treasury denied such claim and on said date notified the plaintiff in writing of such denial, and that the defendants have refused to pay the plaintiff any part of, or all of, the said additional tax.

6. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "6" as alleges that of the amount assessed as additional taxes as aforesaid, excluding interest, the amount of five-thousand four-hundred ten dollars and twenty cents ($5,410.20) was tax which was based upon the measure which included plaintiff's receipts derived from customers who resided or who were located outside of the State of Indiana, and that the balance of one-thousand one-hundred fifty-four dollars and twenty-eight cents ($1,154.28) was the tax imposed upon the measure of the plaintiff's gross income derived from customers located within the State of Indiana.

6(a). The defendants, further answering the complaint, say that they admit so much of the paragraph designated as "6" in the said complaint as alleges that the gross income by virtue of which the tax alleged in the complaint arose out of the transactions set forth in the said complaint, insofar as it is alleged that the plaintiff owns and operates an enamelling plant in Frankfort, Indiana, and that the plaintiff is, and during 1937 was, engaged in enameling parts used by manufacturers of stoves, refrigerators, and other products, but the said defendants deny that in each case the plaintiff's travelling salesmen solicited and negotiated orders from manufacturers located in various states, the defendants admitting that the plaintiff did have travelling salesmen who solicited and negotiated for orders from manufacturers in some instances, but allege that such was not the case in each instance; that the defendants have no knowledge that the original order forms delivered to the plaintiff by such manufacturers were the same forms used generally by them for the purchase of materials. The defendants allege that after the plaintiff accepted orders for enamelling, the stove, refrigerator or other parts, all of plain unenamelled metal were transported by rail or truck from the respective manufacturers to the plaintiff's plant and were there enamelled by the plaintiff, but the defendants deny that such transportation was furnished and paid for by the plaintiff in such instances.

6(b). The defendants further answering the complaint deny that such enamelling was essentially a manufactur-

ing process; but the defendants admit so much of the paragraph designated as "6" in said complaint as alleges that the enamelling process required large ovens and machinery and labor whereby vitreous materials were added to and fused with the plain metal parts furnished by the original manufacturer of the stove, refrigerator or other part, and the defendants admit that the result of the enamelling process or service was enamelled or highly polished articles which were, after such process was completed, transported to manufacturers; the defendants admit that the plaintiff, after the enamelling process was finished, billed the manufacturers who ordered or contracted for such enamelling for the charge for the enamelling service, which charge included a price determined by the cost of materials and the cost of labor used in fusing the enamelling onto the stove, refrigerator or other parts; the defendants admit that such billings were made through the medium of the United States mails.

6(e). The defendants further answering the complaint say that they have no knowledge that "the value of the plain metal parts furnished by such manufacturers was in each instance very considerably less than the value thereof after plaintiff, by the addition of materials and performance of labor as aforesaid, enamelled such parts", and that "in most instances such latter value was at least three-hundred per cent (300%) of the former."

7. The defendants deny so much of page 4 of the complaint as alleges that the assessment of gross income taxes against the plaintiff was illegal and that the plaintiff
12 is entitled to recover the amount so assessed and paid; and the defendants deny that the plaintiff's gross income upon which five-thousand four-hundred ten dollars and twenty cents ($5,410.20) of the said additional assessment is based, was received from sales in interstate commerce and that as applied to such receipts the said Gross Income Tax Act and the assessment of the said taxes constituted a regulation of and a burden upon commerce between the states in violation of the provisions of Article I, Section 8, of the Constitution of the United States; and the defendants further deny that the plaintiff's receipts upon which one-thousand one-hundred fifty-four dollars and twenty cents ($1,154.20) of the said assessment is based, were receipts derived from wholesale sales as defined in Section 3 of Chapter 117 of the Acts of the General Assembly of Indiana of 1937, and the defendants deny that the proper rate of tax to be applied to such re-

ceipts was the rate of one-fourth of one per cent (¼%) instead of the rate of one per cent (1%) as assessed by the Department of Treasury of the State of Indiana.

8. The defendants, as a further answer to the plaintiff's complaint, say that as to any allegation or averment contained in the said complaint not either admitted or denied heretofore in this answer, the defendants now specifically deny each and all of such allegations and averments.

9. Wherefore, the defendants pray for judgment in their favor, for their costs, and for all other proper relief.

(sgd) Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General.

(sgd) Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General,

(sgd) Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for the Defendants.

219 Statehouse,
Indianapolis, Indiana.

13 And afterwards to wit at the May Term of said Court, on the 1st day of May, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Entered May 1, 1939.

It is ordered by the Court that the above entitled cause be, and the same is, hereby assigned for trial, Thursday, May 25, 1939, at 9:30 A. M.

14 And afterwards to wit at the May Term of said Court, on the 25th day of May, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the parties by their respective attorneys, and this cause is now submitted to the Court for trial, and the evidence being heard and concluded, the plaintiff is given to and including June 10, 1939, and the defendants are given to and including June 24, 1939, within which to file their respective briefs, and submit their tentative drafts

of special findings of fact and conclusions of law; and the plaintiff is given to and including June 30, 1939, within which to file a reply brief.

It is ordered by the Court that this cause be, and the same is hereby assigned for oral argument on Tuesday, September 5, 1939, at 9:30 A. M.

41 (Entry for December 7, 1939, continued)

Come now the parties by their respective attorneys and each files a copy of the Official Reporter's Transcript of evidence given on the trial, which is as follows:

Filed Dec. 7, 1939.

42 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—63) * *

Official Reporter's Transcript

of the

Evidence Given on the Trial
Indianapolis
May 25, 1939

Filed Dec. 7, 1939.

44 Be It Remembered, That, in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, before the Honorable Robert C. Baltzell, sole Judge of said Court, the above entitled cause, being at issue, came on for trial, without the intervention of a jury, commencing at nine-thirty o'clock in the forenoon on Thursday, May 25, 1939, and the proceedings upon the trial were in the words and figures following, to-wit:

Appearances:

The Plaintiff appeared by Earl B. Barnes, Esq., and Charles M. Wells, Esq., representing Messrs. Barnes, Johnson & Wells, its attorneys.

The Defendants appeared by Joseph P. McNamara, Esq., Assistant Attorney General of the State of Indiana, their attorney.

45 The Court: Do you have a stipulation that you want to file?

Mr. Wells: We have a stipulation. It has not actually been signed.

The Court: That is all right. You can sign that after a while.

The said Stipulation, marked for identification EXHIBIT NO. 1, was admitted and read in evidence and is in the words and figures following, to-wit:

46 Mr. Barnes: We have some oral testimony, your Honor, that we should like to introduce.

The Court: You may proceed.

The Plaintiff, to Maintain the Issues on its Behalf, Offered and Introduced the Following Evidence, to-wit:

RAYMOND H. COIN, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Barnes:

Q. What is your name?

A. Raymond H. Coin.

Q. You are the president of the plaintiff company, are you not, Ingram-Richardson Manufacturing Company?

A. I am.

Q. And you are living in Frankfort?

A. Yes, sir.

Q. How long have you lived there?

A. About thirty-nine years.

47 Q. And how long have you been connected with the Ingram-Richardson Manufacturing Company?

A. About twenty-three years.

Q. As president, how long?

A. About a year and nine months.

Q. How many plants has this particular corporation, this company, this plaintiff?

A. The Indiana plant, located at Frankfort. We only have the one plant.

Q. There is another company in Pennsylvania, is there not?

A. Right.

Q. Another corporation?

A. That is right.

Q. The stipulation of facts that has been filed here shows that you are engaged in the business of enameling metal parts for refrigerators and for stoves. You have a plant for that purpose, have you not?

A. We have.
Q. And that is located where?
A. Frankfort, Indiana.
Q. I hand you a photograph marked Exhibit A. (Plaintiff's Exhibit A.) Will you state what that is? That
48 is a picture of the plant, is it not?
A. That is right. It is a picture of our plant.
Q. A front view?
A. A front view, showing all the front views of the several units; that is, the laboratories, Building 1, Building 2 and so forth.
Q. I hand you three other exhibits, marked, respectively, B, C and D. Just state briefly what B is.
A. B is a view of the enameling shop in Building No. 1. It shows several pieces of equipment, racks and so forth for the handling of enamel ware.
Q. And C?
A. Is another view of the enameling department of Plant No. 2. This equipment is used for the enameling.
Q. And D?
A. That is a view of the several trucks that we use for transporting enameled parts to and from our customers.
Q. And how many trucks are shown there?
A. There are possibly a dozen here, but we have had as high as fifteen.
Q. And they are standing in front of the main building, are they?
49 A. They are standing in front of the main building, yes, sir.
Mr. Barnes: We offer in evidence Plaintiff's Exhibits A, B, C and D.
Mr. McNamara: To which the defendants, respectively, object for the reason that such exhibits are not material to the issues formed in this cause.
The Court: You have stipulated the value of this plant. What is the purpose of this?
Mr. Barnes: The purpose of this is, your Honor, as I understand the State, they contend that there is a mere service, and we wish to show it is manufacturing under such circumstances that the title in all these parts, which are furnished originally by these refrigerator and stove companies, when they are enameled, passes to the Ingram-Richardson Manufacturing Company and they are sold, then, to these companies, which brings it within the J. D. Adams Manufacturing Company case.
The Court: Interstate commerce?

Mr. Barnes: Yes.

The Court: I will let them be read in evidence. I
50 don't think they have any value at all.

The said photographs, so offered, respectively marked for identification PLAINTIFF'S EXHIBITS A, B, C and D, were admitted and read in evidence and are in the words and figures following, to-wit:

51 Q. I hand you several papers, here, marked Exhibits E, F, G and H, purporting on their face to be purchase orders.

A. That is right.

Q. You may state whether these were taken at the time of the getting your orders from these concerns, in other states, to do this enameling.

A. That is right. These orders were accepted from our customers, covering enameling of the parts.

Q. Do you, in every case where you agree to do this work, always use a purchase order?

A. We do.

Q. And are these purchase orders typical of the orders that you receive on all of your jobs?

A. I would say that they are.

Mr. Barnes: If the Court please, we offer these in evidence.

The Court: I think that is covered by your stipulation, but let's see.

The stipulation provides that you accept orders from the customers and that they ship their products in to
52 the plant for enameling and then you ship them back? Is that the procedure?

Mr. Barnes: That is right.

The Court: Is there any objection to these exhibits?

Mr. McNamara: No objection.

The Court: Let the record show the exhibits that have been offered up to this time read in evidence.

The said purchase orders, so offered, respectively marked for identification PLAINTIFF'S EXHIBITS E, F, G and H, were admitted and read in evidence and are in the words and figures following, to-wit:

53 Q. I believe it has been shown that all of this work of yours, at your plant, involved in this case, is enameling these parts for refrigerators and stoves? Is that right?

A. Correct.

Q. When you enamel the parts for a stove, are there various parts of the same stove?

A. That is correct.

Q. And you handle them as a group operation for that stove unit or that particular model?

A. That is correct.

Q. Taking all of the parts for one particular stove, taking them as a group, the value of the enameling work is what in comparison with the value of the original metal parts?

Mr. McNamara: To which the defendants, respectively, object on the ground that it isn't material, under the issues offered in this cause, and does not tend to prove or disprove said issues,—

The Court: Read the question.

Mr. McNamara: (Continued.) —and, further, that the witness has not been qualified with reference to the
54 value of such parts.

The Court: Read the question.

(The Reporter read the preceding question as follows: "Taking all of the parts for one particular stove, taking them as a group, the value of the enameling work is what in connection with the value of the original metal parts?")

The Court: Overruled.

A. I would say the total finished part, with the enamel, is equal to two and a quarter to two and a half times the original value of the stampings.

The Court: The original what?

The Witness: The original value of the stampings.

Q. By "stampings" you mean the original metal parts?

A. That is right.

Q. Before you work on them? Is that right?

A. That is right.

The Court: I don't know whether I understand it or
55 not.

They send the product to you before it is made up into a refrigerator or some other product?

The Witness: That is correct.

The Court: It comes to you without being finished? Is that right?

The Witness: Without the enamel processing. That is right.

The Court: And you process it?

The Witness: That is right.

The Court: What is it?

The Witness: About two and a quarter to two and a half times, with the enamel applied, the original value of the steel stamping.

The Court: How is that done: the enameling?

The Witness: I beg your pardon?

The Court: How is that enameling process? How is that carried on?

The Witness: The enameling process. The stamping is first put through a pickling operation. There are about six tanks involved and the piece must be thoroughly cleaned before it goes into the enameling process. After it is
56 thoroughly cleaned—

The Court: That is the pickling bath?

The Witness: That is right. Those pickling baths contain several different solutions, including sulphuric acid, nitrate of soda and clear water rinses. Then after it comes from that department it goes into the enameling department and, on the first coat, is dipped in ground-coat and then fired. Then the first white or second coat is sprayed on and fired—to make a complete part, it must have three coats or two coats of white on top of the ground—and then the third coat is applied—sprayed—and fired.

Q. You speak of pickling as to those parts. Is that true of all parts of a certain character?

A. All steel parts must be cleaned or pickled.

Q. That is, steel parts?

A. That is steel parts.

Q. And that cuts everything right down to the metal?

A. That takes any grease or other impurities off of the steel.

Q. There are also cast iron parts, are there not?

A. Yes, sir.

57 Q. Do you pickle those?

A. Those are sand-blasted.

Q. Those are run through a sand blast?

A. They are cleaned through a sand-blasting operation.

Q. And that is machinery that forces particles of sand against the parts?

A. That is right.

Q. And that also smooths the parts?

A. That is right.

Q. You say heat is applied. That requires large ovens?

A. Correct. We have a gas-fired furnace and ovens measuring some seventy feet in length, in which the temperatures are as high as sixteen hundred degrees Fahrenheit.

Q. And do these parts travel through on automatic conveying equipment?

A. They travel through the firing on conveying equipment, yes.

Q. In refrigerator parts, now, what is the value of the enameling, compared with the original parts, taken as a group?

A. We have found, from what business we have
58 handled there, that the finished refrigerator parts run two and a half to three times the original value of the stampings of the sheet steel refrigerator parts in a raw state.

Q. This enameling that is done on the metal is done with a raw material known as frit? Is that true?

A. That is right.

Q. This frit is a granular material, isn't it?

A. That is right.

Q. And who makes this frit?

A. We make our own frit at the company's plant.

Q. And does that require machinery?

A. Quite elaborate equipment is used for making frit.

Q. And what are the basic materials in frit?

A. Frit is composed of several different ingredients: fluorspar, Cobalt oxide, soda ash and so on. It has fifteen to twenty different ingredients.

Q. You make it in different colors, do you not?

A. Frit is made—there are two kinds of frit. The ground coat is in black because there is considerable Cobalt oxide used in it. Cobalt is used for gripping purposes. It grips the steel. The cover coats are white and, in order
59 to get color cover coats, you must apply the colored oxides in the frit and it goes through another process.

Q. Will you state, roughly, the number of colors you have—just roughly?

A. There are probably fifteen to twenty different shades.

Q. When the enamel is finally on the metal part, how is it—is it fused with the metal part?

A. It fuses or more or less blends into the steel—fuses together. That would be with the ground coat or the gripping coat. It fuses right onto the steel under sixteen hundred degrees and it naturally would blend into more or less one mass.

Q. Is that true also of cast iron parts?

A. Correct.

Q. Then this frit is really melted and fused upon the metal parts? Is that right?

A. That is right.

Q. You have customers, I believe, in Illinois, Ohio, Wisconsin and Michigan? Is that true?

A. That is correct.

Q. And all of those states are involved here in this tax matter?

60 A. That is right.

Q. State whether you were in constant touch with these customers of yours by telephone or telegraph or correspondence.

A. We were.

Q. Explain how and why.

A. Well, it so happens that, in the year 1937, we were very busy and, naturally, we got behind on several jobs and, in that event, customers would continually call by telephone and send in telegrams and many communications by mail. That condition still exists, however. It seems to me as though it is easier to get the information to our sales department and factory by telephone than it is by mail.

The Court: Is this product sent to you by mail or express?

The Witness: It is sent by trucks.

Q. By your own trucks?

The Court: Who furnishes the trucks? Is it sent by common carrier?

The Witness: Our own trucks. We operate our own

61 fleet of trucks.

The Court: That is to say, if you get an order in Detroit from someone who has some product to be enameled, you will send your truck for that product, bring it to your factory to be enameled and then return it?

The Witness: That is correct. As a rule, we make a contract with a customer for his year's requirements or season's requirements and we have a continual haul. We take a load of the finished and bring back a load of raw, after we once get started with the customer.

Q. Would it be possible for you to get this business without that hauling arrangement?

Mr. McNamara: To which we object.

The Court: Objection sustained.

Mr. Barnes: I think that is all, your Honor.

The Court: Cross examine.

62 *Cross-Examination.*

Questions by Mr. McNamara:

Q. Directing your attention to your testimony with regard to the trucks, where you send for the product to bring it back to your plant in your own truck, do you return the product, after it has been enameled, by using your own truck?

A. That is correct.

Mr. McNamara: That is all.

The Court: I understood him to say that they deliver a load and then bring back another load.

Mr. McNamara: Yes, I just wanted to bring that out. That is all.

The Court: That is all.

Witness excused.

Mr. Barnes: That is all that we have.

And the Plaintiff here rested.

And the Defendants here rested.

And this was all the evidence given in the cause.

63 The Court: Now, it will be necessary for you to furnish special findings of fact. We will adopt the stipulation insofar as it goes. You can sign it afterwards.

How long do you want to prepare your special findings and brief? Is thirty days long enough?

Mr. Barnes: Oh, I think two weeks would do, your Honor, and whatever Mr. McNamara wants on his side.

The Court: Let's say June 10th. Is that all right?

Mr. Barnes: That is satisfactory to us.

The Court: And you prepare a special finding of facts, adopting the stipulation, Mr. Barnes.

How long, Mr. McNamara, would you want?

Mr. McNamara: Approximately two weeks, your Honor.

The Court: June 25th is all right, is it?

Mr. McNamara: That will be splendid.

The Court: We will make it the 24th. June 25th is on Sunday.

Then June 30th for a reply brief.

Do you want to argue the case orally?

Mr. Barnes: I think we would like to have an oral argument.

64 The Court: Well, I think, then, we had better assign it later for oral argument or let's make it September 5th. That is the day after Labor Day. Is that all right?

Mr. McNamara: That is all right, your Honor.

Mr. Barnes: The day after Labor Day?
The Court: Yes.
Mr. Barnes: September 5th for the oral argument.
The Court: Yes. These dates will be fixed in one order and you will each receive a copy of it.
Whereupon, the trial was concluded.

15 And afterwards towit at the May Term of said Court, on the 8th day of September, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the parties by their respective attorneys, and the Court having heard the evidence and the argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

16 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Sept. 8, 1939.
* * (Caption—63) * *

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of Fact.

The Court finds the facts specially herein as follows:

1. Jurisdiction is founded on the existence of a Federal question. The matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

2. Plaintiff is an Indiana corporation, whose principal place of business is at Frankfort, Indiana. Defendant Department of Treasury of the State of Indiana is an executive department of said state vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chap. 50, Acts of 1933, as amended by Chap. 117, Acts of 1937). Defendants M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson constitute the Board of Department of Treasury of the State of Indiana.

3. On July 1, 1938, defendant Department of Treasury notified plaintiff that said defendant proposed to assess
17 thereunder additional tax against plaintiff in the amount of $6,564.48 for the second, third and fourth quarters of 1937, and on or about July 14, 1938, plaintiff filed with said defendant a written protest against such proposed assessment and fully stated therein the grounds of such protest. A hearing on such protest was thereafter held by defendant Department of Treasury but on or about February 13, 1939, said defendant denied said protest and ruled against plaintiff with respect thereto.

4. On February 16, 1939, defendant Department of Treasury assessed against plaintiff said additional tax and issued a notice and demand to plaintiff therefor, together with interest in the amount of $613.13, totaling $7,177.61, which total amount plaintiff paid on February 20, 1939.

5. On February 23, 1939, plaintiff, on a form prescribed by the defendant Department of Treasury filed with said defendant its verified petition for a correction of the amount so paid by plaintiff to said defendant, and for a refund thereof. In said petition plaintiff set forth the amount which it claimed should be refunded and the reasons for such claim. Said defendant denied said claim and petition on February 23, 1939, and on said date notified plaintiff in writing of such denial. Defendants have refused to pay to plaintiff any part of or all said additional tax.

6. Of the aforesaid additional tax, excluding interest, $5,410.20 was based upon plaintiff's receipts from its customers outside Indiana, and the balance of $1,154.28 was based upon plaintiff's receipts from its customers in Indiana. Prior to said additional assessment, plaintiff paid to defendant Department of Treasury of Indiana the gross income tax, at the rate of ¾ of 1%, on plaintiff's receipts upon which $1,154.28 of said additional assessment is based.

7. Plaintiff owns and operates an enameling factory at Frankfort, Indiana. Plaintiff has about ten acres of ground on which are located two main buildings and several smaller buildings. In such buildings are installed various machines, ovens, tools and equipment. Plaintiff also owns and uses in its business various automotive equipment. Plaintiff's investment in said ground, buildings, machinery, tools and equipment was in excess of $400,000. During the last nine months of 1937, the period involved herein, plaintiff had approximately 625 employees, consisting of workmen and foremen in the factory proper, chemists, engineers and an office and managerial staff.

8. Plaintiff is, and during 1937 was, engaged in
18 enameling parts used by stove and refrigerator manufacturers located in Indiana, Ohio, Michigan, Wisconsin and Illinois. Plaintiff's traveling salesmen originally solicited and negotiated purchase orders in said states from such manufacturers. In such purchase orders plaintiff's customers ordinarily set forth the quantity, description and price of the various items of enameling to be done by plaintiff; also set forth shipping and billing instructions and other terms of purchase, such as the following terms among others:

"Do not execute at higher prices than previously quoted or changed without our approval.

"This order is issued with the understanding that if material is not according to our specifications, same will be returned at seller's expense.

"By acceptance and in consideration hereof, the vendor warrants that the above articles do not infringe on any United States patent, that he will defend any suit that may arise in respect thereto, and that he will save the vendee harmless from any loss which may be incurred by the assertion of any patent rights therein.

"If prices are higher than those stipulated on order, make no shipment until permission is granted by us.

"If prices are omitted from order, it is understood and agreed that your billing will be based on the prevailing market prices in effect at time of shipment.

The purchase orders forming the basis of the receipts from the transactions involved herein were orders obtained as aforesaid by plaintiff's traveling salesmen or were repeat orders placed with plaintiff by plaintiff's customers. In addition, plaintiff's enameling superintendent and other officials of plaintiff called at the plants of such customers, from time to time, for the purpose of assisting such customers in designing new parts and working out enameling problems and complaints of such customers. Extensive communication by mail, telephone and telegraph was carried on between plaintiff and such customers in connection with plaintiff's business with such customers.

9. After plaintiff accepted the aforesaid purchase orders, the stove and refrigerator parts, of plain unenameled metal, were transported, ordinarily by plaintiff's trucks, from the respective customers' plants in said states to plaintiff's said plant and were there enameled by plaintiff. Such enameling was a process requiring large expensive

machinery, ovens, tools and equipment as aforesaid and extensive labor whereby vitreous materials were added to and fused with the plain metal parts furnished by such customers. All steel parts were first put through a
19 so-called pickling bath in six different tanks containing various chemical solutions in order to prepare such parts for enameling. Cast iron parts were prepared for the enameling by sand blasting instead of pickling. After the parts were prepared in the pickling department or sand blasting department they were put through plaintiff's enameling department. The first coat of enameling was a dipped ground coat upon the parts which were then "fired," that is, baked in large special ovens seventy feet long having a temperature of approximately 1600 degrees Fahrenheit. The parts traveled through such ovens on special conveying equipment. The second coat of enamel was sprayed on with special spraying equipment and the parts were again fired in said ovens. The third and final coat of enameling was applied in the same manner as the second. The enamel itself was a melted granular substance known as frit. The frit was made by plaintiff in plaintiff's factory, and was composed of flourspar, cobalt oxide, soda ash and numerous other ingredients. Upon the completion of the enameling process there resulted highly polished, enameled articles and these were transported, ordinarily by plaintiff's trucks, to such customers for assembly into the finished products. Plaintiff thereafter billed such customers for said enameling and remittances on such billings were made by mail to plaintiff.

10. The value of the plain metal parts as a unit furnished by plaintiff's customers was in each instance considerably less than the value thereof after plaintiff, by the addition of materials and performance of labor as aforesaid, had enameled such parts. With respect to such parts used in stoves, such latter value was from 2¼ to 2½ times the former, and with respect to such parts used in refrigerators, such latter value was from 2½ to 3 times the former.

(Signed) Robert C. Baltzell,
Judge.

September 8, 1939.

Conclusions of Law.

The court states in its conclusions of law herein as follows:

1. The law is with the plaintiff, in respect of that portion of the claim sued on arising from receipts from plaintiff's customers located outside Indiana, and plaintiff is entitled to recover of and from defendants the sum of Five Thousand Nine Hundred Twenty-One Dollars and Forty-four Cents ($5921.44) with interest according to law.

2. The plaintiff is entitled to recover its costs in this action, taxed at $.....

3. The law is with the defendants in respect of that portion of the claim sued on arising from receipts from plaintiff's customers located in Indiana.

Robert C. Baltzell,
Judge, U. S. District Court for the Southern District of Indiana, Indianapolis Division.

September 8, 1939.

20 (Entry for September 8, 1939, continued.)

Entered Sept. 8, 1939.

It Is, Therefore, Ordered, Adjudged And Decreed that plaintiff have and recover of and from the defendants herein the sum of Five Thousand Nine Hundred Twenty-one Dollars and Forty-four Cents ($5921.44), with interest at the rate of 3% per annum from February 20, 1939, until paid, together with the costs of this action taxed at $.....

21 And afterwards towit at the November Term of said Court, on the 7th day of December, 1939, the following further proceedings were had herein, towit:

Come now the defendants by their attorneys and file notice of appeal to the United States Circuit Court of Appeals for the Seventh Circuit, which notice of appeal is as follows:

Filed Dec. 7, 1939.

22 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana,

Indianapolis Division.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff,*

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants.*

No. 63, Civil.

NOTICE OF APPEAL.

Filed Dec. 7, 1939.

Notice is hereby given that the Department of Treasury of the State of Indiana and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, the defendants in the above-entitled cause, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment of the District Court in this cause to the effect that the plaintiff recover from these defendants the sum of Five Thousand Nine Hundred Twenty-One Dollars and forty-four cents ($5,921.44) with interest thereon at the rate of three per centum (3%) per annum from February 20, 1939, until paid, together with the costs of this action, which judgment was entered on September 8, 1939.

23 M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana,

Department of Treasury of the State of Indiana,

Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General of Indiana,
Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General of Indiana,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General of Indiana,
Attorneys for Defendants-Appellants.

219 Statehouse,
Indianapolis, Indiana.

Receipt of the foregoing "Notice of Appeal" is hereby acknowledged this 4th day of December, 1939.

Earl B. Barnes,
Charles M. Wells,
Attorneys for Plaintiff-Appellee, Ingram-Richardson Manufacturing Company of Indiana, Inc.

24 (Entry for December 7, 1939, continued.)

And said defendants also file appeal bond in the sum of $250.00 with Hartford Accident & Indemnity Company as surety thereon, which is as follows:

25 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 7, 1939.

* * (Caption—63) * *

APPEAL BOND.

Filed Dec. 7, 1939.

Know All Men By These Presents, that we, the Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, as principal, and Hartford Accident and Indemnity Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the Ingram-Richardson Manufacturing Company of Indiana, Inc., as appellee,

in the full and just sum of Two-Hundred Fifty Dollars ($250.00) to be paid to said appellee, its successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, severally by these presents:

Sealed with our seals and dated this 7th day of December, 1939:

26 Whereas there was rendered on September 8, 1939, in the United States District Court for the Southern District of Indiana, Indianapolis Division, in a suit pending in the said court between the Ingram-Richardson Manufacturing Company of Indiana, Inc., plaintiff, and Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, defendants, a judgment against said defendants, and the said defendants have duly filed a notice of an appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, therefore, the condition of the above obligation is such that if the said defendants-appellants shall prosecute this appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award with the judgment being modified, then the above obligation is to be voided, otherwise to remain in full force and effect.

Department of Treasury of the State of Indiana,

M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana,

By Gilbert K. Hewit.

Hartford Accident and Indemnity Company, Surety,

By B. V. Havens,

B. V. Havens,

(Seal) *Attorney-in-fact.*

Countersigned at Indianapolis, Ind.

By C. F. Kreis,

Authorized Agent.

27 Hartford Accident and Indemnity Company
Hartford, Connecticut

Power of Attorney

Know all men by these Presents, That Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, does hereby make, constitute and appoint B. V. Havens of Indianapolis, Indiana, its true and lawful Attorney-in-fact, with full power and authority to sign, execute and acknowledge any and all bonds and undertakings on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities; and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed, and to bind Hartford Accident and Indemnity Company thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive officer of Hartford Accident and Indemnity Company and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorney-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following By-Law adopted by the Board of Directors of Hartford Accident and Indemnity Company at a meeting duly called and held on the 2nd day of June, 1914:

Article XIII (A)

Section 2. The Executive Officers of the Company shall have power and authority to appoint for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such Resident Vice-President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given him.

Section 5. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such officers.

In Witness Whereof, Hartford Accident and Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 6th day of January, 1939.

Hartford Accident and Indemnity Company,
(signed) Wallace Stevens,
Vice-President.

(Corporate Seal)

Attest:
(signed) J. O. Lummis,
Assistant Secretary.

State of Connecticut, } ss.
County of Hartford. }

On this 6th day of January, A. D. 1939, before me personally came Wallace Stevens, to me known, who being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Vice-President of Hartford Accident and Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

(signed) A. P. Whalen,
Notary Public.

(Notarial Seal)

My commission expires Feb. 1, 1941.

Certificate.

State of Connecticut, } ss.
County of Hartford. }

I, the undersigned, Assistant Secretary of the Hartford Accident and Indemnity Company, a Connecticut Corporation, Do Hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore, that Article XIII (A), Sections 2 and 5, of the By-Laws of the Company, set forth in the Power of Attorney, is now in force.

Given under my hand and the seal of the company, at the City of Hartford, on December 7, 1939.

R. V. Ohern,
(Seal) *Assistant Secretary.*

28 (Entry for December 7, 1939, continued.)

And defendants also file statement of points, which is as follows:

29 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—63) * *

Filed Dec. 7, 1939.

STATEMENT OF POINTS.

Filed Dec. 7, 1939.

The defendants-appellants, Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, pursuant to Rule 75(d) of the Rules of Civil Procedure for the District Courts of the United States, now make this concise statement of the points on which the said defendants-appellants intend to rely on the appeal.

The defendants, as appellants on appeal, will rely upon the following points as supporting their contention that the
District Court committed error in its conclusions of
30 law numbered one and two, and in the entry of judgment on September 8, 1939, against said defendants-appellants, which conclusions and judgment were prejudicial to the defendants-appellants, and which said conclusions and judgment were to the effect that the plaintiff (ap-

pellee on appeal) recover from these defendants-appellants the sum of Five Thousand Nine-Hundred Twenty-One Dollars and forty-four cents ($5,921.44) with interest thereon, together with the costs of this action:

Point One: The defendants-appellants should not be required to refund, nor should the plaintiff-appellee recover, the sums designated in the judgment for the reason that the Five Thousand Nine-Hundred Twenty-One Dollars and forty-four cents ($5,921.44) there designated did not represent a tax imposed by the defendants-appellants measured by receipts derived from business conducted between the State of Indiana and other states of the United States.

Point Two: The defendants-appellants should not be required to refund, nor should the plaintiff-appellee recover, the sums designated in the judgment for the reason that the Five-Thousand Nine-Hundred Twenty-One Dollars and forty-four cents ($5,921.44) there designated did not represent a tax imposed by the defendants-appellants measured by gross income derived from business conducted between the State of Indiana and other states of the United States to the extent that such gross income is excepted from being utilized as a measure under the terms and provisions of Section 6(a) of Chapter 50, Indiana Acts of 1933 (pages 392-393), or Section 6(a) of Chapter 117, Indiana Acts of 1937 (page 615).

Respectfully submitted,

Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General of Indiana,

31

Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General of Indiana,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General of Indiana,
Attorneys for defendants-appellants, Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana.

219 Statehouse,
Indianapolis, Indiana.

32 (Entry for December 7, 1939, continued.)

Comes now the plaintiff by its attorneys and files notice of cross-appeal, which is as follows:

33 IN THE DISTRICT COURT OF THE UNITED STATES

Filed Dec. 7, 1939.

For the Southern District of Indiana,

Indianapolis Division.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff,*

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants.*

No. 63 Civil.

NOTICE OF CROSS-APPEAL BY INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.

Filed Dec. 7, 1939.

Notice is hereby given that Ingram-Richardson Manufacturing Company of Indiana, Inc., plaintiff above-mentioned, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from that part of the final judgment entered in this action on September 8, 1939, to the effect that plaintiff take nothing from defendants in respect of that portion of the claim sued on arising from receipts from plaintiff's customers located in Indiana.

Earl B. Barnes,
Charles M. Wells,
Attorneys for said Ingram-Richardson Manufacturing Company of Indiana, Inc.

Fletcher Trust Building,
Indianapolis, Indiana.

Receipt of the foregoing notice of cross appeal is
34 hereby acknowledged this 6th day of December, 1939.

Omer Stokes Jackson,
The Attorney General,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for Defendants.

35 (Entry for December 7, 1939, continued.)

And said plaintiff also files cross-appeal bond in the sum of $250.00 with Fred Bates Johnson as surety thereon, which bond is as follows:

Filed Dec. 7, 1939.

36 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—63) * *

CROSS-APPEAL BOND OF INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.

Filed Dec. 7, 1939.

Know all men by these presents that we, Ingram-Richardson Manufacturing Company of Indiana, Inc., as principal, and Fred Bates Johnson, as surety, are held and firmly bound unto the Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, in the full and just sum of $250.00, to be paid to said obligees, their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, severally by these presents.

Sealed with our seals and dated this 6th day of December, 1939.

Whereas there was rendered on September 8, 1939, in the United States District Court for the Southern District of Indiana, Indianapolis Division, in a suit pending in said court between principal obligor herein, as plaintiff, and
37 obligees, as defendants, a judgment, part of which was against said obligor, and said obligor has duly filed a notice of a cross appeal therefrom to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, therefore, the condition of the above obligation is such that if said obligor shall prosecute said cross appeal to effect and pay all costs if the cross appeal is dismissed or said part of said judgment affirmed, or such costs as said United States Circuit Court of Appeals may award upon modification of the judgment, then the above obligation shall be voided, otherwise to remain in full force and effect.

Ingram-Richardson Manufacturing
Company of Indiana, Inc.,
By R. S. Dukes,
Treasurer.
Fred Bates Johnson,
Surety.

United States of America
District of Indiana } ss.

Fred Bates Johnson of Indianapolis, Indiana, the surety on the within bond, being duly sworn on his oath, says that he is worth in his own name and right in unencumbered real estate, situate in the District aforesaid, and over and above the entire amount of his indebtedness and legal exemption, more than $1,000, which is less than the fair cash value of said real estate.

Fred Bates Johnson.

Subscribed and sworn to before me this 5th day of December, 1939.

Vera Cox,
Notary Public.

(Seal)

My commission expires February 17, 1942.

38 (Entry for December 7, 1939, continued.)

And plaintiff also files statement of points, which is as follows:

Filed Dec. 7, 1939.

39 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—63)

STATEMENT OF POINT BY INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.

Filed Dec. 7, 1939.

Said Ingram-Richardson Manufacturing Company of Indiana, Inc., pursuant to Rule 75 (d) of the Rules of Civil Procedure for the District Courts of the United States, now makes this concise statement of the point upon which said party intends to rely on its cross appeal.

Said party, in support of its contention that the District Court erred in its conclusion of law numbered three and in the entry of that part of the judgment on September 8, 1939, the effect of which was that plaintiff take nothing from defendants in respect of that portion of the claim sued on arising from receipts from plaintiff's customers located in Indiana, which said conclusion and said portion of the judgment were prejudicial to plaintiff, will rely upon the following point:

Plaintiff's said receipts, upon which $1,154.28, excluding interest, of the assessment involved is based, were from wholesale sales as defined in Section 3, a-3, of Chapter 117 of the Indiana Acts of 1937, and were therefore taxable at the rate of ¼ of 1% as originally returned and paid by plaintiff instead of 1% as assessed by defendant Department of Treasury of Indiana, which amount, with interest as provided by law, plaintiff was entitled to recover, in addition to the sum of $5,921.44, plus interest and costs, recovered in said judgment.

40

Respectfully submitted,

Earl B. Barnes,
Charles M. Wells,
Attorneys for Ingram-Richardson Manufacturing Company of Indiana, Inc.

Fletcher Trust Building,
Indianapolis, Indiana.

65 (Entry for December 7, 1939, continued.)

And the parties also file stipulation as to the record on appeal, which is as follows:

66 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 7, 1939.

* * (Caption—63) * *

STIPULATION AS TO RECORD.

Filed Dec. 7, 1939.

It Is Hereby Stipulated between the parties in the above-entitled cause, pursuant to Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States, that instead of serving designations of the record as provided for in the aforementioned rules, the parties do now designate the following parts of the record, and the same shall be prepared by the Clerk of the Court for use on appeal and cross-appeal to the United States Circuit Court of Appeals for the Seventh Circuit:

1. Bill of complaint;
2. Appearances for defendants;
3. Answer of defendants;
4. All of the evidence, including the stipulation and the official court reporter's transcript of the evidence, and specifically including all exhibits and particularly plaintiff's exhibits A, B, C, D, E, F, G, and H;
5. Findings of fact;
6. Conclusions of law;
7. Final judgment entered September 8, 1939;
8. All order book entries in said cause not enumerated herein;

67 9. Notice of appeal by defendants-appellants;

10. Appeal bond;
11. Defendants-appellants' statement of points to be relied upon;
12. Notice of appeal by plaintiff-appellee;
13. Cross-appeal bond;
14. Plaintiff-appellee's statement of points to be relied upon;
15. This stipulation as to the designation of parts of the record;
16. Clerk's certificate to transcript of record.

In Witness Whereof we have hereunto set our hands this 6th day of December, 1939.

Earl B. Barnes,
Charles M. Wells,
As attorneys for the plaintiff-appellee, Ingram-Richardson Manufacturing Company of Indiana, Inc.

Omer Stokes Jackson,
Attorney General,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
As attorneys for the defendants-appellants, Department of Treasury of the State of Indiana, and M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana.

Entered Jan. 15, 1940. 68 And afterwards to wit at the November Term of said Court, on the 15th day of January, 1940, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

It appearing to the Court that it is necessary and proper that the original exhibits hereinafter enumerated should be inspected by the United States Circuit Court of Appeals for the Seventh Circuit upon the appeal to said Court, and that the said original exhibits should be sent to said Circuit Court of Appeals in lieu of copies thereof;

It Is, Therefore, Ordered that the following exhibits be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, Illinois, and that, pursuant to the rules of the said Circuit Court of Appeals on a final determination of the appeal to said Court, said exhibits be returned to the Clerk of this Court:

1. Plaintiff's Exhibit A, a photograph;
2. Plaintiff's Exhibit B, a photograph;
3. Plaintiff's Exhibit C, a photograph;
4. Plaintiff's Exhibit D, a photograph;

5. Plaintiff's Exhibit E, an order;
6. Plaintiff's Exhibit F, an order;
7. Plaintiff's Exhibit G, an order;
8. Plaintiff's Exhibit H, an order.

69 United States of America
Southern District of Indiana } ss.
Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of Ingram-Richardson Manufacturing Company of Indiana, Inc., *vs.* Department of Treasury of the State of Indiana, et al, No. 63 Civil, according to the stipulation as to record filed on December 7, 1939, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 15th day of January, 1940.

Albert C. Sogemeier,
(Seal) *Clerk, United States District Court,*
Southern District of Indiana.

BLANK PAGE

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the fourteenth day of February, 1940, in the following entitled causes:

Ingram-Richardson Manufacturing Company of Indiana, Inc.,
Plaintiff-Appellee,

7198 *vs.*

Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellants,

Ingram-Richardson Manufacturing Company of Indiana, Inc.,
Plaintiff-Appellant,

7199 *vs.*

Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of December, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

BLANK PAGE

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the city of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the sixteenth day of January, 1940, there was filed in the office of the Clerk of this Court, a certificate to exhibits which said certificate is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana,

Indianapolis Division.

Ingram-Richardson Manufacturing Company of Indiana, Inc.,
vs.
Department of Treasury of the State of Indiana, *et al.*

No. 63 Civil.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that this envelope contains the following original exhibits.

Plaintiff's Exhibit A, a photograph;
Plaintiff's Exhibit B, a photograph;
Plaintiff's Exhibit C, a photograph;
Plaintiff's Exhibit D, a photograph;
Plaintiff's Exhibit E, an order;
Plaintiff's Exhibit F, an order;
Plaintiff's Exhibit G, an order;
Plaintiff's Exhibit H, an order;

which are being transmitted in accordance with an order of Court, made and entered on January 15, 1940.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 15th day of January, 1940.

Albert C. Sogemeier,
(Seal) *Clerk.*

Endorsed: Filed Jan. 16, 1940. Frederick C. Campbell, Clerk.

And afterwards, to-wit: On the twenty-second day of January, 1940, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellants, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7198. October Term, 1940.

Ingram-Richardson Mfg. Co.,
Plaintiff-Appellee,

vs.

Department of Treasury, etc.,
Defendants-Appellants,

The Clerk will enter my appearance as counsel for the Defendant-Appellant.

Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
219 Statehouse,
Indianapolis, Indiana.

Endorsed: Filed Jan. 22, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the tenth day of June, 1940, the following proceedings were had and entered of record, to-wit:

Monday, June 10, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants,*

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants,*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day come the parties by their counsel, and these causes come on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Messrs. Charles M. Wells and Earl B. Barnes, counsel for Ingram-Richardson Manufacturing Company of Indiana, Inc., and by Mr. Joseph P. McNamara, counsel for the State of Indiana, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twentieth day of July, 1940, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and fiures following, to-wit:

IN THE UNITED STATE CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

October Term, 1939, April Session, 1940.

No. 7198.
INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellee,
vs.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, *et al.*,
Defendants-Appellants.

No. 7199.
INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Plaintiff-Appellant,
vs.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, *et al.*,
Defendants-Appellees.

On Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

July 20, 1940.

Before SPARKS and MAJOR, *Circuit Judges,* and LINDLEY, *District Judge.*

MAJOR, *Circuit Judge.* This is an action to recover the amount of $7177.61, taxes collected by the defendants from the plaintiff under the provisions of the Indiana Gross Income Tax Act (Chap. 117 of the Indiana Acts of 1937, pages 604-645). Of the foregoing, the recovery of $5410.20 was sought upon the theory that it represented an assessment of taxes measured by receipts derived from transactions in commerce between Indiana and other states to which plaintiff was entitled to the exemption specified in Section 6 (a) of Chapter 117 of the Indiana Acts of 1937 (at page 615). The plaintiff sought the recovery of $1154.26 of the amount first mentioned above, upon the theory that it represented taxes assessed upon receipts

derived from wholesale sales, as that term is defined by Section 3 (a) of the Act.

The court below sustained plaintiff's contention as to the sum of $5410.20 and entered judgment against the defendants. The appeal in No. 7198 is by the defendants from this judgment.

The court below denied plaintiff's contention as to the sum of $1154.26, and entered judgment against the plaintiff. The appeal in No. 7199 is by the plaintiff from this judgment. Both appeals may be appropriately considered and disposed of in one opinion.

Plaintiff owns and operates an enameling factory at Frankfort, Indiana, in which are installed various machines, ovens and equipment. It is engaged in the manufacture of enamel, a vitreous substance of fluorspar, cobalt oxide, soda ash, etc., both in a granular form known in the industry as frit, and in a hard finished form, fused with metal parts. In the transactions or business from which the gross income was received, and upon which the tax was laid, the enamel was fused with metal parts used in stoves and refrigerators, manufactured by plaintiff's customers located in Indiana and other states. Plaintiff's traveling salesmen originally solicited and negotiated what are referred to as "purchase orders" from such customers. After the acceptance of these orders by the plaintiff, the metal parts to be enameled were transported by plaintiff's trucks from the customer's place of business, both within and without Indiana, to plaintiff's place of business at Frankfort. After the completion of the enameling process, the identical parts were returned to customers, also by plaintiff's trucks. The stove and refrigerator parts were then incorporated as an integral part into stoves or refrigerators, which were manufactured by plaintiff's customers. Thereafter, plaintiff billed such customers for said enameling, and remittances were made to plaintiff by mail to its Frankfort office.

In Appeal No. 7198, the question involved is whether the transactions of plaintiff were in interstate commerce so as to make the gross income therefrom immune from taxation under Article I, Section 8, of the United States Constitution.

In Appeal No. 7199, the question involved is whether plaintiff's income was from "wholesale sales" as defined by the Act. If so, it was liable only for a tax at the rate

of one-fourth of one per cent; otherwise it was liable at the rate of one per cent. It is the difference which plaintiff contends was illegally collected and which it now seeks to recover.

In Appeal No. 7198, it is argued by the plaintiff that (1) its gross income was from the sale of goods in interstate commerce, and that (2) if not the sale of goods, the income was from services rendered in interstate commerce. As to (1), we disagree with plaintiff's contention. This question, however, is determinative of the question raised in Appeal No. 7199, discussed hereinafter.

The Act in question imposes a tax upon the receipt of gross income measured by the amount or volume thereof. Defendants concede that the gross income involved was derived from the performance of service, but deny that such service was rendered in interstate commerce. The argument revolves to a considerable extent, around Section 6 of the Act, which provides that there shall be excepted from the gross income, taxable under the Act, that portion of the income derived from business conducted in commerce between the states "but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America." It is argued that this is an exemption provision in favor of the taxpayer and the burden is upon the taxpayer to bring itself within its terms. It is our view that this is not an exemption provision, but merely a limitation, in conformity with the commerce clause, upon the power of the state to tax. In other words, this provision neither adds to, nor detracts from, the rights of either the taxpayer or the state.

Whether this view be correct or not, however, the question remains as to whether plaintiff's income received from customers in other states was of an interstate character, which made it immune from taxation. Defendants' argument is predicated upon the theory that the income was received solely from the enameling process performed in plaintiff's Indiana factory. There is some support for this basis in the court's finding of facts, but a reading of the entire findings makes it plain, we think, that the income received was for the total service rendered by the plaintiff, which included the enameling process. Other services which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of

contracts, both in other states. Also included in the service was the transportation by plaintiff of the stove and refrigerator parts from points in other states, and the return transportation of such parts by plaintiff after the completion of the enameling process. There was also included, communications by mail, telephone and telegraph between plaintiff and customers located in other states.

As bearing upon the precise question involved, each side cites one case only. Plaintiff relies upon *Gwin, White & Prince, Inc.* v. *Henneford, et al.*, 305 U. S. 434, and defendants rely upon *Western Live Stock et al.* v. *Bureau of Revenue, et al.*, 303 U. S. 250. In the former case the State of Washington sought to collect a gross receipts tax upon gross revenue from services derived by a corporation as marketing agent for growers of fruit. Representatives of the corporation, at various points outside the state, negotiated sales of the fruit on behalf of the corporation, executed contracts of sale, effected delivery of the shipments to the purchasers, and collected and remitted the purchase price. The corporation income consisted of the compensation for the entire service, which was at a stipulated rate per box of fruit sold. The court held such services to be within the protection of the commerce clause of the Federal Constitution, and in doing so, on page 438, said:

> "* * * A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. * * *"

In the Western Live Stock case, the court held, page 253:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, * * * Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. * * *"

In that case the court distinguished between income received from a contract entered into in another state and income from its performance. That is the distinction which defendants seek here to make. In other words, its position, if sustained, must be upon the premise that the

income was received solely from the services rendered at Frankfort, Indiana. As stated, we do not believe this premise is sound and it follows that the argument based thereon must fail.

While the question is not free from doubt, we are of the opinion that the reasoning employed in the case of Gwin, White & Prince, Inc., is applicable. We therefore conclude that the state was without authority to assess and collect the tax involved, and the judgment of the District Court in this respect is affirmed.

In Appeal No. 7199, plaintiff contends that its gross income was from receipts from "wholesale sales" as defined in Section 3 (a) 3. The material language of such section is:

> "* * * The term 'wholesale sales' means and includes only the following: * * * (3) Sales of any tangible personal property which is to be incorporated by the purchaser as a material or an integral part into tangible property produced by such purchaser in the business of manufacturing, assembling, constructing, refining, or processing; * * *"

Defendants contend that plaintiff's income was taxable under Section 3 (f) of the Act, which imposes the tax upon "gross income from professional services, personal services, or services of any character whatsoever, * * *"

Plaintiff's contention, if sustained, must be upon the basis that it was engaged in the sale of tangible personal property rather than in the sale of a service. It argues that its business consists of the sale of the material which was used in connection with the enameling process, that title to the stove and refrigerator parts, received from its customers, passed to it, and that when the finished product was returned to the customer, a sale was effected and the title reconveyed to the customer. Stress is placed upon the finding that after the enameling process had been completed, the value of the finished product was two or three times greater than it was before. We are of the view that plaintiff's contention cannot be sustained. Clearly, we think its income was derived from the rendition of service, which included numerous elements such as labor, transportation and equipment expense. True, there was included the value of the material. Just what part of the total income this represented, the record does not disclose, but even if it did, it would not, in our opinion, con-

stitute a sale within the meaning of the Act. The acts of the parties themselves indicate that they did not regard the transaction as a sale or as passing title. When the stove or refrigerator parts were received by the plaintiff, no payment was made or credit extended to the customer, and no charge made against the plaintiff, and when returned, no charge was made against the customer for the original part. The identity of the original part was not destroyed by the enameling process and the part returned to the customer was the identical part received from the customer.

We agree with the defendants that the relation between plaintiff and its customers was nothing more than that of bailor and bailee. The distinction between a sale and bailment, as made by the court in *Sturm* v. *Boker*, 150 U. S. 312, is pertinent. On page 329, the court said:

> "* * * The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. * * *"

We therefore conclude that plaintiff's income was not from sales of property, but from service. The judgment in favor of the defendants is

AFFIRMED.

Endorsed: Filed July 20, 1940. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the Twentieth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, July 20, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants,*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and interest from the date of the judgment of said District Court until paid, at the same rate that similar judgments bear in the Courts of the State of Indiana.

And afterwards, to-wit: On the second day of August, 1940, there was filed in the office of the Clerk of this Court, a petition for a rehearing, which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the twelfth day of August, 1940, there was filed in the office of the Clerk of this Court, an answer to petition for a rehearing, which said answer is not copied here.

And afterwards, to-wit: On the fifth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, October 5, 1940.

Court met pursuant to adjournment.
Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

And afterwards, to-wit: On the tenth day of October, 1940, there was filed in the office of the Clerk of this Court, a motion for stay of issuance of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

Seventh Circuit.

Ingram-Richardson Manufacturing Company of Indiana, Inc.. *Plaintiff-Appellee,* *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants-Appellants.*	No. 7198

MOTION FOR STAY OF ISSUANCE OF MANDATE.

The appellants, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, now move the Court to enter an order withholding the mandate in this case because it is the bona fide intention of the appellants to make a proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, and in support of this motion, the appellants attach the professional statement of its counsel.

Samuel D. Jackson,
Attorney General of Indiana.

Joseph W. Hutchinson,
Deputy Attorney General,

Joseph P. McNamara,
Deputy Attorney General,
Counsel for Appellants.

I, Joseph P. McNamara, certify that it is the bona fide intention of the appellants in the above-entitled case to make an application to the Supreme Court of the United States for a Writ of Certiorari within the time limited by law, and I believe there is merit in appellants' case and that the judgment of the United States Circuit Court of

Appeals for the Seventh Circuit in said case ought to be reversed by the Supreme Court of the United States.

Dated this 9th day of October, 1940.

Joseph P. McNamara
Indianapolis, Indiana.

The Ingram-Richardson Manufacturing Company of Indiana, Inc., appellee, by its counsel, acknowledges service of above Motion for Stay of Mandate and receipt of copy of said Motion on October 9, 1940. On October 9, 1940, the undersigned was informed of said Motion and notified that it would be filed at once.

Barnes, Hickam, Pantzer & Boyd,
Earl B. Barnes,
Charles M. Wells,
Attorneys for Appellees.

Endorsed: Filed Oct. 10, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the sixteenth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, October 16, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for appellants, it is ordered that the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the fourteenth day of November, 1940, there was filed in the office of the Clerk of this Court a motion for a further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,* *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants-Appellants.*	No. 7198

MOTION FOR STAY OF ISSUANCE OF MANDATE.

The appellants, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, now move the Court to enter an order further withholding the mandate in this case because it is the bona fide intention of the appellants to make a proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, and appellants now respectfully represent that numerous other engagements and the preparation of other briefs have prevented the appellants from perfecting their application to the Supreme Court of the United States for a Writ of Certiorari within the time that the mandate was originally stayed by this Court, and in support of this motion the appellants attach the professional statement of their counsel.

Samuel D. Jackson,
Attorney General of Indiana.
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
Counsel for Appellants.

I, Joseph P. McNamara, certify that it is the bona fide intention of the appellants in the above-entitled case to make an application to the Supreme Court of the United States for a Writ of Certiorari within the time limited by law, and I believe there is merit in appellants' case and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said case ought to be reversed by the Supreme Court of the United States.

Dated this thirteenth day of November, 1940.

Joseph P. McNamara
Indianapolis, Indiana.

The Ingram-Richardson Manufacturing Company of Indiana, Inc., appellee, by its counsel, acknowledges service of above Motion for Stay of Mandate and receipt of copy of said Motion on November 13, 1940. On November 13, 1940, the undersigned was informed of said Motion and notified that it would be filed at once.

Earl B. Barnes,
Charles M. Wells,
Attorneys for Appellee.

Endorsed: Filed Nov. 14, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of November, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, November 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,*
7198 *vs.*
Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered that the motion of counsel for appellants for a further stay of issuance of the mandate of this Court in this cause be, and it is hereby, granted.

And afterwards, to-wit: On the twentieth day of November, 1940, there was filed in the office of the Clerk of this Court, a praecipe for record, which said praecipe is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

Seventh Circuit.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellee,* *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants-Appellants.*	No. 7198.

To the Honorable Kenneth J. Carrick, Clerk, U. S. Circuit Court of Appeals for the Seventh Circuit, 1212 Lake Shore Drive, Chicago, Illinois:

The defendants-appellants in the above cause respectfully request that you prepare for use in the presentation of a petition for certiorari a true and complete copy of the record in the above entitled cause, including but not in limitation thereof, a copy of the printed record filed in the United States Circuit Court of Appeals in said cause, and a full, true and complete copy of the proceedings had in said Circuit Court of Appeals, certified under your hand and the seal of the Court.

Samuel D. Jackson,
Attorney General of Indiana,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for Defendants-Appellants.

Endorsed: Filed Nov. 20, 1940. Kenneth J. Carrick, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the city of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the twentieth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, July 20, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by

this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and interest from the date of the judgment of said District Court until paid, at the same rate that similar judgments bear in the Courts of the State of Indiana.

And afterwards, to-wit: On the third day of August, 1940, there was filed in the office of the Clerk of this Court, a petition for a rehearing, which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the fifth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, October 5, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

And afterwards, to-wit: On the sixteenth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, October 16, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for appellant, it is ordered that the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the fifteenth day of November, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, November 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered that the motion of counsel for appellant for a further stay of issuance of the mandate of this Court in this cause be, and it is hereby, granted.

And afterwards, to-wit: On the sixteenth day of December, 1940, the following further proceedings were had and entered of record, to-wit:

Monday, December 16, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,*
7199 *vs.*
Department of Treasury of the State of Indiana, *et al.*, etc., *Defendants-Appellees.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and it is hereby, stayed for a further period of thirty days.

And afterwards, to-wit: On the seventeenth day of December, 1940, there was filed in the office of the Clerk of this Court, a praecipe for record, which said praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Ingram-Richardson Manufacturing Company of Indiana, Inc., *Plaintiff-Appellant,* *vs.* Department of Treasury of the State of Indiana, *et al.*, *Defendants-Appellees.* } No. 7199.

PRAECIPE.

To the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, Chicago, Illinois:

Ingram-Richardson Manufacturing Company of Indiana, Inc., plaintiff-appellant in the above-entitled cause, respectfully requests that you prepare for use in the presentation of a petition for certiorari a true and complete copy of each of the following proceedings had and papers filed in said cause:

1. Printed record filed in said cause. (Already prepared.)
2. Proceedings had and entered of record on June 10, 1940. (Already prepared.)
3. Opinion of the court filed July 20, 1940. (Already prepared.)
4. Judgment entered on July 20, 1940. (To be added.)
5. A recitation of the filing of petition for rehearing but omitting said petition itself. (To be added.)
6. Order of the court entered October 5, 1940, denying plaintiff's petition for rehearing. (To be added.)
7. Each order of the court staying mandate. (To be added.)

all certified under your hand and seal of the court.

Barnes, Hickam, Pantzes & Boyd,
Earl B. Barnes,
Charles M. Wells,
Attorneys for Plaintiff-Appellant.

Endorsed: Filed Dec. 17, 1940. Kenneth J. Carrick, Clerk.

BLANK PAGE

CLERK'S CERTIFICATE.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed (except briefs of counsel and petition for rehearing) in the following entitled cause:

Cause No. 7198

Ingram-Richardson Manufacturing Company of Indiana, Inc.,

Plaintiff-Appellee,

vs.

Department of Treasury of the State of Indiana, *et al.*,

Defendants-Appellants,

and a true copy of proceedings had and papers filed (except briefs of counsel, petition for rehearing, motions for stay of mandate) in the following entitled cause:

Cause No. 7199

Ingram-Richardson Manufacturing Company of Indiana, Inc.,

Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,

Defendants-Appellees,

as the same remain upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of December, 1940.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 3, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2922)

BLANK PAGE

No. 655

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting the BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

SAMUEL D. JACKSON,
Attorney General of the State of Indiana,
JOSEPH W. HUTCHINSON,
Deputy Attorney General,
JOSEPH P. MCNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

C. B. Pauley & Co., Inc., Indianapolis

BLANK PAGE

SUBJECT INDEX

TABLE OF AUTHORITIES IN PETITION AND BRIEF

CITATION TO CONSTITUTION OF THE UNITED STATES

TABLE OF STATUTES CITED

OPINION OF CIRCUIT COURT OF APPEALS IN THE PRESENT CASE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting *the* BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Petitioners,

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Board of Department of Treasury of the State of Indiana, respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action, originally instituted in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and thereafter appealed to the United States Circuit Court of Appeals for the Seventh Circuit, the same being cause No. 7198 in the said Circuit Court of Appeals, was an action to recover taxes collected by the petitioners from the respondent under the Indiana Gross Income Tax Act of 1933 (Chapter 50, Indiana Acts 1933:: Burns' Indiana Statutes Annotated, 1933 Ed., sec. 64-2601 et seq.:: Baldwin's Indiana Statutes, 1934 Ed., sec. 15981 et seq.).

The respondent was successful in the District Court. An appeal was taken by the petitioners resulting in an affirmance of the decision of the District Court (the opinion of the Circuit Court of Appeals for the Seventh Circuit was handed down on July 20, 1940, and the rehearing denied October 5, 1940, and is reported in 114 Fed. (2d) 889). This application for a writ of certiorari is for the purpose of having this Honorable Court review the decision of the Circuit Court of Appeals for the Seventh Circuit.

The Contested Issues Are as Follows

1. Whether the gross receipts derived solely from the enameling by respondent of personal property of another can constitutionally (clause 3, Sec. 8, Art. 1, Federal Constitution) be utilized as a measure of an excise tax assessed by the state in which the enameling activity is completely

carried on, where an agreement exists that the enameler will, prior to the enameling, transport the unenameled property from another state to the enameling plant located in the taxing state and, after processing, return the enameled product to the customer.

2. Whether or not taxes measured by receipts from a local business activity of processing property of another which is separate and distinct from the transportation of the subject personal property processed are prohibited by the terms of the Commerce Clause of the Federal Constitution merely because, in the ordinary course of business, interstate transportation precedes and follows such processing.

The Facts

The facts may, for simplicity, be summarized as follows:

1. *Source of the gross income which was the measure of the tax.* All of the gross receipts which were used as a measure for the taxes assessed, the refund of which is sought in this suit, were received by the respondent at its principal place of business in Frankfort, Indiana, and were derived by the respondent during the second, third, and fourth quarters of the year of 1937, from the enameling of metal parts belonging to stove and refrigerator manufacturers. The enameling process was completely performed at the respondent's enamel-processing plant located at Frankfort, Indiana.

2. *Steps in enameling process of respondent.* The respondent's traveling salesmen originally solicited and negotiated orders from stove and refrigerator manufacturers located in the States of Indiana, Ohio, Michigan,

Wisconsin, and Illinois. The orders forming the basis of the receipts used as the measure of the tax here involved were obtained as aforesaid by the respondent's traveling salesmen, or were repeat orders placed with respondent by customers.

After the respondent had accepted the orders, the stove and refrigerator parts of plain unenameled metal were transported, ordinarily by respondent's trucks, from the plants of the respective customers to the respondent's plant at Frankfort, Indiana, and were there enameled by the respondent. In order to prepare such parts for enameling, all steel parts were first put through a so-called "pickling" bath in six different tanks containing various chemical solutions. Cast iron parts were prepared for the enameling by sand blasting instead of pickling. After the parts were prepared in the pickling department, or sandblasting department, they were put through the respondent's enameling department. The first coat of enamel was a dipped brown coat upon the parts, which were then "fired," that is, baked in large special ovens, seventy feet long, having a temperature of approximately 1,600 degrees Fahrenheit. The parts traveled through such ovens on special conveying equipment. The second coat of enamel was sprayed on with special spraying equipment, and the parts were again fired in said oven. The third and final coat of enamel was applied in the same manner as the second. The enamel itself was a melted granular substance known as frit. The frit was made by respondent in respondent's factory, and was composed of flourspar, cobalt oxide, soda ash, and numerous other ingredients. Upon the completion of the enameling process, there resulted highly polished, enameled articles, and these were trans-

ported, ordinarily by the respondent's trucks, to such customers for assembly by them into their finished product. Respondent thereafter billed such customers *for said enameling*, and remittances on such billing were made by mail to the respondent. There is no evidence that the respondent ever produced the plain unenameled metal parts upon which the enameling process was carried on—in each instance such plain, unenameled metal stampings were the property of the stove or refrigerator manufacturers for whom the enameling was done, and in each instance the parts, when the enameling process was completed, were returned to such stove or refrigerator manufacturers and were by them incorporated as an integral part into stoves or refrigerators so produced by such stove and refrigerator manufacturers.

B

Reasons Relied Upon for the Allowance of the Writ

1. In ruling that "the state was without authority to assess and collect the tax involved" for the reason that the gross receipts utilized as the measure of the tax were receipts from commerce between the states within the meaning of clause 3 of section 8 of Article I of the Constitution of the United States, the Circuit Court of Appeals for the Seventh Circuit decided a question of federal law in a way probably in conflict with applicable decisions of this Court.

See: C.C.A. opinion, R. 48; also brief in support of this petition, p. 11 to 17, infra.

2. In ruling that the respondent's gross income utilized as the measure of this tax was derived not only from the enameling processing which took place within Indiana, but "other services * * * which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of contracts, both in other states," and "included in the services was the transportation by plaintiff of the stove and refrigerator parts from points in other states and the return transportation of such parts by plaintiff after the completion of the enameling process," and that "There was also included, communications by mail, telephone and telegraph by the plaintiff and customers located in other states," the Circuit Court of Appeals for the Seventh Circuit included as the source of the income, items too attenuated to prohibit by virtue of section 8 of Article I of the Federal Constitution the imposition of the tax utilizing such gross receipts as its measure, so that the said Circuit Court of Appeals has decided a question of federal law in a way probably in conflict with the applicable decisions of this court.

See: C.C.A. opinion, R. 46, 47, 48; also brief in support of this petition, p. 11 to 17, infra.

C

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U.S.C.A., Section 347.

D

Opinions Below

The judgment of the District Court is set forth in the Record at page 23. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 114 Fed. (2d) 889, and is also set forth in the Record at pages 44-49.

The judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court, was entered on July 20, 1940, and is set forth at page 50 of the Record, and the petition for a rehearing was denied by the said Circuit Court of Appeals on October 5, 1940 (R. 51).

Your petitioners append hereto their brief in support of this petition, in which each of the foregoing matters is more fully set forth and discussed.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued as of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in the case numbered and entitled on its docket, "No. 7198, *Ingram-Richardson Manufacturing Company of Indiana, Inc.*, Plaintiff-Appellee, *v. Department of Treasury of the State of Indiana, et al.*, Defendants-Appellants,"

and that said judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting the BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

By: SAMUEL D. JACKSON,
Attorney General of the State of Indiana,

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

JOSEPH P. MCNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.....

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting the BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Court Below

The opinion of the Circuit Court of Appeals for the Seventh Circuit in *Ingram-Richardson Manufacturing Company of Indiana, Inc., v. Department of Treasury of the State of Indiana, et al.*, No. 7198, was rendered on July 20, 1940, and is reported at 114 Fed. (2d) 889, and is also reproduced in the Record at pp. 40-49. Petition for rehearing was denied on October 5, 1940, R. 51.

II

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U.S.C.A., Section 347.

II

Statement of the Case

The Court is respectfully referred to the statement of the case under the heading "A" in the foregoing petition for writ of certiorari (supra, pp. 2 to 5).

IV

Specification of Errors

The Court is respectfully referred to the "Reasons relied upon for the allowance of the writ," which are the errors relied upon, under the heading "B" in the foregoing petition for writ of certiorari (supra, pp. 5 to 6).

V

ARGUMENT

One

The Compensation Was Paid to Respondent for its Service in Enameling the Parts

A. The parties stipulated, and the District Court found, that the receipts used as the measure of this tax were received by the respondent for enameling.

Stipulation, par. 3, p. 2;
F. 9, R. 22.

B. There is no evidence or finding indicating that the measure of the tax "also included * * * the transportation by respondent of the stove and refrigerator parts from points in other states, and the return transportation of such parts by respondent after the completion of the enameling process."

The petitioners have never included in the measure of the tax any gross receipts from transportation across state lines of persons, property or intelligence,—hence any such receipts would be eliminated before any assessment was made and before litigation was instituted. The parties understood and stipulated that the measure of the tax here involved was received by the respondent for *enameling*, and the District Court so found.

Stipulation, par. 3, p. 2;
F. 9, R. 22.

In view of this state of the Record, it is apparent that transportation fees were not included in the measure of this excise.

Two

The Receipts Were Not From an Interstate Activity

A. The Circuit Court opinion appears to hold that the gross income used as the measure of this tax was derived from interstate commerce upon the authority of *Gwin, White & Prince, Inc. v. Henneford, et al.* (1939), 305 U. S. 434. However, it is well to note that the factual situation dealt with by the United States Supreme Court in that case differs materially from the factual situation presently presented. In the *Gwin, White & Prince, Inc.*, case the activity which was being carried on was stated (at p. 436) as being:

> "Appellant undertakes to sell these products at prices fixed by the federation, to obtain their widest possible distribution, to attend to all traffic matters pertaining to shipment and transportation of the fruit, to effect delivery to purchasers, to collect and remit the sales price."

Thus the business activity from which Gwin, White & Prince, Inc., derived its gross receipts was that of distributing and acting as a traffic manager for its clients, so that most of its revenue-producing activities were carried on in states other than the State of Washington.

How different is the situation presented in this instance: Here the income is not derived from acting as a traffic manager, or from negotiating the sale of the finished product to purchasers in other states, nor from collecting

income as agent for a principal from debtors located in other states; the Record shows that the income used as the measure of this tax was derived as compensation for rendering the service of enameling (F. 9, R. 22). The Record does not disclose that the receipts used as the measure of this tax were derived from any other source. Hence, the activities of the taxpayers were quite diverse: That of Gwin, White & Prince, Inc., being similar to that rendered by a company engaged in transportation and in traffic management necessarily performing the service for which payment was made within several different states, while in the present appeal there is no element of traffic management present. All of respondent's gross income utilized as the measure of this tax was derived as payment for the services it rendered wholly within Indiana.

The question presented by the Record and by the briefs filed by both parties is: Were or were not the gross receipts derived from the enameling service alone so closely connected with interstate commerce as to be beyond the power of taxation by the State of Indiana under the Gross Income Tax Act?

B. The Supreme Court of the United States in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 at 439, indicates that the rationale for its decision is:

> "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon

> it, *merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed.*"

In the present instance it is quite apparent that there is no potential risk of the multiple tax burden such as that referred to by the Supreme Court in *Gwin, White & Prince, Inc. v. Henneford, supra.* All that is used as the measure of this tax is the income derived from rendering the service of enameling,—no other income is included in the measure, —and the respondent performs no services in connection with the enameling in other states which would subject it to the taxing jurisdiction of such states with reference to this particular income.

In this respect the present appeal is quite like the decision of the United States Supreme Court in *Western Live Stock v. Bureau of Revenue* (1938), 303 U. S. 250:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question * * * nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce, forbidden merely because, in the ordinary course, such transportation or intercourse is induced or occasioned by the business." (Cited cases.)
>
> "Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or.

> because, as an incident preliminary to printing and publishing the advertisements, the advertisers sent cuts, copy, and the like to appellants."

If "the mere formation of a contract between persons in different states is not within the protection of the commerce clause," then that portion of the opinion of the Circuit Court of Appeals which states:

> "Other services which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of contracts, both in other states" (R. 46-47)

cannot validly represent that the activities specified are sufficient to so alter the factual situation with reference to the performance of the contracts (i. e., the enameling locally), as to remove the state's jurisdiction to tax.

Similarly, the:

> "communications by mail, telephone and telegraph between plaintiff and customers located in other states" (R. 47)

to which the Circuit Court opinion refers must be regarded as being upon the same plane as the activities described in the *Western Live Stock* case:

> "* * * as an incident preliminary to publishing the advertisements, the advertisers sent cuts, copy, and the like to appellants." (303 U. S. 250 at 254.)

It will be recalled that the activities above enumerated were held in the *Western Live Stock* case not to be sufficient to forbid the tax.

The proper test to be applied in the instant appeal then, is whether or not the enameling processing, for which the respondent received the compensation used as the measure of this tax, was itself a transaction in interstate commerce. If the enameling processing were a transaction in commerce between the states, then the respondent would unquestionably be entitled to the exemption granted by Section 6(a) of Chapter 117 of the Indiana Acts of 1937. If the performance of the contract, i. e., the enameling processing, is not of itself a transaction contemplated by the commerce clause, then the respondent is not entitled to the exemption which it seeks.

In the present instance we are dealing with income which was not derived from the sale of the articles transported, nor do we have a tax levied upon the worth after enameling of such transported personal property belonging to another. The measure of the tax included income from a very different source, viz.: it represented the compensation paid to the respondent for rendering the contractual service of enameling, at its Frankfort, Indiana, plant, the stove and refrigerator parts, which at all times were owned by the person who contracted with the respondent to have such enameling done. In view of this situation we must conclude that the tax in question did not use as its measure receipts which the State of Indiana was prohibited from using as a measure of taxation by the provisions of clause 3 of section 8 of Article I of the Constitution of the United States of America.

We think it is abundantly shown in this case that the measure of the tax is derived solely from an intrastate activity, and that the levy using that basis is valid.

On the grounds stated in the petition, and for the reasons more fully set forth in this brief, it is respectfully submitted that a writ of certiorari should be granted and the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

SAMUEL D. JACKSON,
Attorney General of the State of Indiana,

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

JOSEPH P. MCNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

BLANK PAGE

No. 655.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting the BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,

Respondent.

ON CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONERS

GEORGE N. BEAMER,
Attorney General of Indiana,

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

JOSEPH P. MCNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

BLANK PAGE

SUBJECT INDEX

TABLE OF AUTHORITIES

CITATION TO CONSTITUTION OF THE UNITED STATES

TABLE OF STATUTES CITED

OPINION OF CIRCUIT COURT OF APPEALS IN THE PRESENT CASE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON AND FRANK G. THOMPSON, as and constituting *the* BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Petitioners,

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Respondent.

No. 655.

ON CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONERS

I

The Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Seventh Circuit in *Ingram-Richardson Manufacturing Company of Indiana, Inc.*, v. *Department of Treasury of the State of Indiana, et al.*, No. 7198, was rendered on July 20, 1940, and is reported at 114 Fed. (2d) 889, and is also reproduced in the Record at pp. 40-49. Petition for rehearing was denied on October 5, 1940, R. 51.

(The writ of certiorari was granted by the court on February 3, 1941.)

II

Statement of the Case

This action, originally instituted in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and thereafter appealed to the United States Circuit Court of Appeals for the Seventh Circuit, the same being cause No. 7198 in the said Circuit Court of Appeals, was an action to recover taxes collected by the petitioners from the respondent under the Indiana Gross Income Tax Act of 1933 (Chapter 50, Indiana Acts 1933::Burns' Indiana Statutes Annotated 1933 Ed., sec. 64-2601 et seq.::Baldwin's Indiana Statutes, 1934 Ed., sec. 15981 et seq.).

The respondent was successful in the District Court. An appeal was taken by the petitioners resulting in an affirmance of the decision of the District Court (the opinion of the Circuit Court of Appeals for the Seventh Circuit was handed down on July 20, 1940, and the rehearing denied October 5, 1940, and is reported in 114 Fed. (2d) 889). The writ of certiorari was granted by this Court on February 3, 1941.

The Facts

The facts may, for simplicity, be summarized as follows:

1. *Source of the gross income which was the measure of the tax.* All of the gross receipts which were used as a measure for the taxes assessed, the refund of which is sought in this suit, were received by the respondent at its principal place of business in Frankfort, Indiana, and were derived by the respondent during the second, third, and fourth quarters of the year of 1937, from the enameling of metal parts belonging to stove and refrigerator manufacturers. The enameling process was completely performed at the respondent's enamel-processing plant located at Frankfort, Indiana.

2. *Steps in enameling process of respondent.* The respondent's traveling salesmen originally solicited and negotiated orders from stove and refrigerator manufacturers located in the States of Indiana, Ohio, Michigan, Wisconsin and Illinois. The orders forming the basis of the receipts used as the measure of the tax here involved were obtained as aforesaid by the respondent's traveling salesmen, or were repeat orders placed with respondent by customers.

After the respondent had accepted the orders, the stove and refrigerator parts of plain unenameled metal were transported, ordinarily by respondent's trucks, from the plants of the respective customers to the respondent's plant at Frankfort, Indiana, and were there enameled by the respondent. In order to prepare such parts for enameling, all steel parts were first put through a so-called "pickling" bath in six different tanks containing various chemical solutions. Cast iron parts were prepared for

the enameling by sand blasting instead of pickling. After the parts were prepared in the pickling department, or sand blasting department, they were put through the respondent's enameling department. The first coat of enamel was a dipped brown coat upon the parts, which were then "fired," that is, baked in large special ovens, seventy feet long, having a temperature of approximately 1,600 degrees Fahrenheit. The parts traveled through such ovens on special conveying equipment. The second coat of enamel was sprayed on with special spraying equipment, and the parts were again fired in said oven. The third and final coat of enamel was applied in the same manner as the second. The enamel itself was a melted granular substance known as frit. The frit was made by respondent in respondent's factory, and was composed of fluorspar, cobalt oxide, soda ash, and numerous other ingredients. Upon the completion of the enameling process, there resulted highly polished, enameled articles, and these were transported, ordinarily by the respondent's trucks, to such customers for assembly by them into their finished product. Respondent thereafter billed such customers *for said enameling*, and remittances on such billing were made by mail to the respondent. There is no evidence that the respondent ever produced the plain unenameled metal parts upon which the enameling process was carried on—in each instance such plain, unenameled metal stampings were the property of the stove or refrigerator manufacturers for whom the enameling was done, and in each instance the parts, when the enameling process was completed, were returned to such stove or refrigerator manufacturers and were by them incorporated as an integral part into stoves or refrigerators so produced by such stove and refrigerator manufacturers.

III

Specification of Errors

THE CONTESTED ISSUES ARE AS FOLLOWS

1. Whether the gross receipts derived solely from the enameling by respondent of personal property of another can constitutionally (clause 3, Sec. 8, Art. 1, Federal Constitution) be utilized as a measure of an excise tax assessed by the state in which the enameling activity is completely carried on, where an agreement exists that the enameler will, prior to the enameling, transport the unenameled property from another state to the enameling plant located in the taxing state and, after processing, return the enameled product to the customer.

2. Whether or not taxes measured by receipts from a local business activity of processing property of another which is separate and distinct from the transportation of the subject personal property processed are prohibited by the terms of the Commerce Clause of the Federal Constitution merely because, in the ordinary course of business, interstate transportation precedes and follows such processing.

IV

Summary of the Argument

A. The receipts used as the measure of this tax were received by the respondent for enameling.

Stipulation, par. 3, p. 2;
F. 9, R. 22.

B. The mere formation of a contract between persons in different states is not within the protection of the commerce clause unless the performance of the contract is a transaction constituting commerce between the states.

Western Live Stock v. Bureau of Revenue (1938),
303 U. S. 250.

Similarly, communications by mail, telephone, or telegraph between the respondent and its customers who were located in other states must be considered as an incident preliminary to the rendition of service by the respondent and as such too attenuated to transform the intrastate servicing into a transaction in interstate commerce, so as to remove the income derived from the local activity of enameling from the jurisdiction of the state to tax.

Western Live Stock v. Bureau of Revenue (1938), 303 U. S. 250.

C. The instant appeal deals with a factual situation which differs radically from that before the court in *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, since in that case the service for which the charge was made was one which necessarily straddled state lines, since it was the service of selling interstate, distributing the articles sold in interstate commerce, acting as a traffic manager with respect to the articles sold, and making collection from the purchasers in states other than the taxing state, and remitting across state lines to the producers of the article sold. In the present case the respondent does not act as a sales agent or a distributor, nor as a traffic manager for those who contract to have stove and refrigerator parts enameled by it. The only service which it provides is carried on exclusively at Frankfort, Indiana. No part of the enameling service is rendered by the respondent in any state other than the State of Indiana.

V

ARGUMENT

One

The Compensation Was Paid to Respondent for its Service in Enameling the Parts

A. The parties stipulated, and the District Court found, that the receipts used as the measure of this tax were received by the respondent for enameling.

Stipulation, par. 3, p. 2;
F. 9, R. 22.

B. There is no evidence or finding indicating that the measure of the tax "also included * * * the transportation by respondent of the stove and refrigerator parts from points in other states, and the return transportation of such parts by respondent after the completion of the enameling process."

The petitioners have never consciously included in the measure of the tax any gross receipts from transportation across state lines of persons, property or intelligence,—hence any such receipts would be eliminated before any assessment was made and before litigation was instituted. The parties understood and stipulated that the measure of the tax here involved was received by the respondent for *enameling*, and the District Court so found.

Stipulation, par. 3, p. 2;
F. 9, R. 22.

In view of this state of the Record, it is apparent that transportation fees were not included in the measure of this excise. (Also it should be remembered that the respondent seeks as a refund not an amount alleged to be

derived from transportation, but contrarywise, amounts it received for enameling.)

Two

The Receipts Were Not From an Interstate Activity

A. The Circuit Court opinion appears to hold that the gross income used as the measure of this tax was derived from interstate commerce upon the authority of *Gwin, White & Prince, Inc.* v. *Henneford, et al.* (1939), 305 U. S. 434. However, it is well to note that the factual situation dealt with by the United States Supreme Court in that case differs materially from the factual situation presently presented. In the *Gwin, White & Prince, Inc.*, case the activity which was being carried on was stated (at p. 436) as being:

> "Appellant undertakes to sell these products at prices fixed by the federation, to obtain their widest possible distribution, to attend to all traffic matters pertaining to shipment and transportation of the fruit, to effect delivery to purchasers, to collect and remit the sales price."

Thus the business activity from which Gwin, White & Prince, Inc., derived its gross receipts was that of selling, distributing, collecting, and acting as a traffic manager for its clients, so that most of its revenue-producing activities were carried on in states other than the State of Washington.

How different is the situation presented in this instance: Here the income is not derived from acting as a traffic manager, or from negotiating the sale of the finished product to purchasers in other states, nor from collecting income as agent for a principal from debtors located in other states; the Record shows that the income used as the

measure of this tax was derived as compensation for rendering the service of enameling (F. 9, R. 22). The Record does not disclose that the receipts used as the measure of this tax were derived from any other source. Hence, the activities of the taxpayers were quite diverse: That of Gwin, White & Prince, Inc., being similar to that rendered by a company engaged in transportation and in traffic management necessarily performing, within several different states, the service for which payment was made, while in the present appeal there is no element of traffic management present. All of respondent's gross income utilized as the measure of this tax was derived as payment for the services it rendered wholly within Indiana.

The question presented by the Record and by the briefs filed by both parties is: Were or were not the gross receipts derived from the enameling service alone so closely connected with interstate commerce as to be beyond the power of taxation by the State of Indiana under the Gross Income Tax Act?

B. The Supreme Court of the United States in *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434 at 439, indicates that the rationale for its decision is:

> "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, *merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed.*"

In the present instance it is quite apparent that there is no potential risk of the multiple tax burden such as that referred to by the Supreme Court in *Gwin, White & Prince, Inc.*, v. *Henneford, supra.* All that is used as the measure of this tax is the income derived from rendering the service of enameling,—no other income is included in the measure, —and the respondent performs no services in connection with the enameling in other states which would subject it to the taxing jurisdiction of such states with reference to this particular income.

In this respect the present appeal is quite like the decision of the United States Supreme Court in *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250:

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question * * * nor is taxation of a local business or occupation which is separate and distinct from the transportaton and intercourse which is interstate commerce, forbidden merely because, in the ordinary course, such transportation or intercourse is induced or occasioned by the business." (Cited cases.)
>
> "Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because, as an incident preliminary to printing and publishing the advertisements, the advertisers sent cuts, copy, and the like to appellants."

If "the mere formation of a contract between persons in different states is not within the protection of the commerce clause," then that portion of the opinion of the Circuit Court of Appeals which states:

> "Other services which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of contracts, both in other states" (R. 46-47)

cannot validly represent that the activities specified are sufficient to so alter the factual situation with reference to the performance of the contracts (i. e., the enameling locally), as to remove the state's jurisdiction to tax.

Similarly, the:

> "communications by mail, telephone and telegraph between plaintiff and customers located in other states" (R. 47)

to which the Circuit Court opinion refers must be regarded as being upon the same plane as the activities described in the *Western Live Stock* case:

> "* * * as an incident preliminary to publishing the advertisements, the advertisers sent cuts, copy, and the like to appellants." (303 U. S. 250 at 254.)

It will be recalled that the activities above enumerated were held in the *Western Live Stock* case not to be sufficient to forbid the tax.

The proper test to be applied in the instant appeal then, is whether or not the enameling processing, for which the respondent received the compensation used as the measure of this tax, was itself a transaction in interstate commerce. If the enameling processing were a transaction in commerce between the states, then the respondent would unquestionably be entitled to the exemption granted by Section 6(a) of Chapter 117 of the Indiana Acts of 1937. If the performance of the contract, i. e., the enameling processing, is not of itself a transaction contemplated by the

commerce clause, then the respondent is not entitled to the exemption which it seeks.

In the present instance we are dealing with income which was not derived from the sale of the articles transported, nor do we have a tax levied upon the worth after enameling of such transported personal property belonging to another. The measure of the tax included income from a very different source, viz.: it represented the compensation paid to the respondent for rendering the contractual service of enameling, at its Frankfort, Indiana, plant, the stove and refrigerator parts, which at all times were owned by the person who contracted with the respondent to have such enameling done. In view of this situation we must conclude that the tax in question did not use as its measure receipts which the State of Indiana was prohibited from using as a measure of taxation by the provisions of clause 3 of section 8 of Article I of the Constitution of the United States of America.

We think it is abundantly shown in this case that the measure of the tax is derived solely from an intrastate activity, and that the levy using that basis is valid.

On the grounds stated in the petition, and for the reasons more fully set forth in this brief, it is respectfully submitted that a writ of certiorari should be granted and the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

GEORGE N. BEAMER,
Attorney General of Indiana,

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

JOSEPH P. MCNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

BLANK PAGE

BLANK PAGE

FILE COPY

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1940.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana, *Petitioners,*

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC., *Respondent.*

No. 655.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EARL B. BARNES,
ALAN W. BOYD,
CHARLES M. WELLS,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana,
Counsel for Respondent.

C. E. Pauley & Co., Inc., Indianapolis

BLANK PAGE

INDEX

TABLE OF CASES AND STATUTES

Cases

Statutes

Constitution

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1940.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana, *Petitioners,*

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC., *Respondent.*

No. 655.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Facts

Petitioners' statement of the facts is substantially correct, but contains certain legal conclusions of petitioners and omits certain facts.

The facts set forth on pages 1 to 3 of the brief of respondent as petitioner in No. 656, October Term, 1940, are relevant here except that the gross receipts involved here were from respondent's customers located in Ohio, Michigan, Wisconsin and Illinois. Additional facts are:

Respondent by its own trucks transported the plain metal parts from such customers' factories to its factory, there enameled them, transported them by said trucks back to the customers' factories, had its enameling superintendent and other officials call on the customers at said factories from time to time in connection with the customers' enameling problems, carried on extensive communication with its customers by mail, telephone and telegraph, in connection with its business with such customers, and received by mail payments of the prices set forth in the purchase orders. (R. 21, 22.)

The Issue

Petitioners' statements of the issues (pp. 2 and 3 of their petition; p. 13 of their brief) are inaccurate. The issue is whether, because of the commerce clause of the Constitution, respondent's aforesaid receipts were not subject to the Indiana Gross Income Tax Act (Chapter 117 of the Indiana Acts of 1937, Sec. 64-2601 et seq. Burns' Ind. Stat. 1933, Pocket Supp. 1940). Said Act was before this court in *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307. Amendments adopted in 1937, except as indicated in the Company's brief in No. 656, October Term, 1940, are not involved.

B

Summary of Argument

1. Such receipts were from sales of goods and were non-taxable.

2. Such receipts, even if from services, were from interstate commerce. As applied thereto, the tax violates the commerce clause of the Constitution.

ARGUMENT

1.

For reasons discussed in the Company's brief in No. 656, October Term, 1940, respondent's receipts were from sales of goods and hence were non-taxable. *J. D. Adams Manufacturing Co. v. Storen,* 304 U. S. 307. Attention was called in such brief to relevant provisions of the Uniform Sales Act. That act was in force in each of the aforesaid states at all times in question. (Sec. 8381 et seq. Throckmorton's 1940 Annotated Code of Ohio; Sec. 9444 et seq. Michigan Compiled Laws of 1929; Sec. 121.01 et seq. Wisconsin Statutes 1939; Chap. 121a Illinois Revised Statutes, 1939.)

The language in the final paragraph of Part 1 of the argument in such brief was inadvertently disarranged. The following was intended: That the prices paid by the Company's customers reflected labor and other costs made the hard, finished enamel no less tangible personal property. The prices paid for the road machinery manufactured by J. D. Adams Manufacturing Co. doubtless reflected cost of material, labor and other costs, but the road machinery was nevertheless tangible personal property.

2.

Petitioners tacitly concede that if respondent's receipts were from interstate commerce, they were not subject to the tax, but contend that the receipts were from services which were solely intrastate in character. However, even if the receipts were from services, not from sales of goods, they were nevertheless from interstate commerce.

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 435-441, the state of Washington sought to collect a gross receipts tax upon appellant corporation's gross revenue from services rendered by the corporation as marketing agent for growers of apples and pears. Representatives of the corporation at various points outside Washington negotiated sales of the fruit on behalf of the corporation, executed contracts of sale, effected delivery of the shipments to the purchasers, and collected and remitted the purchase price. The corporation carried on extensive communication by telephone, telegraph and cable with its representatives outside Washington. The corporation's compensation for the entire service was at a stipulated rate per box of fruit sold. The entire services were held to be within the protection of the commerce clause. Said the Court (p. 438):

> "While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume."

In the case at bar, respondent's traveling salesmen negotiated purchase orders from respondent's customers outside Indiana, respondent by its own trucks transported the plain metal parts to its factory, there enameled them, transported them by said trucks back to its customers' factories, had its enameling superintendent and other officials call on the customers at their factories from time to time in connection with the customers' enameling problems, and carried on extensive communication with its customers by mail, telephone and telegraph. Even if such activities be deemed the rendering of services, they nevertheless constituted interstate commerce, and were within the protection of the commerce clause.

In *Kansas City v. Seaman*, 99 Kans. 143, 160 Pac. 1139, 1140, 1141, L. R. A. 1917B, 341, a laundry corporation having its plant in Kansas City, Missouri, sent its wagons to gather up linen of patrons who lived across the state line in Kansas City, Kansas. The corporation hauled the linen back to the plant in Missouri and, after the linen had been laundered, delivered it to the patrons in Kansas and collected the charges therefor. The Court held that this was a service performed in interstate commerce and that therefore a Kansas City, Kansas, license tax upon each laundry operated within the city, the amount to be determined by the number of wagons employed, was inapplicable to said laundry corporation. The taxing authorities' contention that there was no commerce involved "because there was no barter or sale of personal property" and because the laundry company had "nothing but services to sell" was promptly rejected by the Court. The Court, citing *International Textbook Co. v. Pigg*, 217 U. S. 91, which involved interstate teaching by correspondence, ruled that "a sale of service involving transportation be-

tween the homes of the customers in Kansas and the place where the service was performed in Missouri" constituted interstate commerce. The further holding that the corporation was not carrying on a laundry business within Kansas City, Kansas, in no wise renders inapplicable the ruling with respect to interestate commerce.

In *National Labor Relations Board v. Hopwood Retinning Co.*, 98 F. (2d) 97, 99, 100, the retinning company's plant was in New York. The company's business consisted of straightening milk and ice cream containers, removing rust therefrom and retinning and resoldering them. Part of the company's business was with customers located outside New York. The company's trucks picked up from such customers the containers upon which work was to be done, transported them to the company's plant and, after completion of the work there, returned them to the customers. The company was held to be engaged in interstate commerce. Said the Court (pages 99, 100):

> "Hopwood contends that it is not engaged in interstate commerce . . . but merely performs a service. It refers to" various cases, "but these cases are not applicable. Hopwood's trucks picked up and made deliveries of containers upon which work was to be done and transported them . . . in interstate commerce. Its business consisted of straightening the containers, the removal of rust and solder and retinning and resoldering. New bottoms and other parts were also supplied, all of which was included in the service charge. . . . It was clearly engaged in interstate commerce."

Likewise, in *National Labor Relations Board v. Fashion Piece Dye Works*, 100 F. (2d) 304, 305, a company which operated a plant in Pennsylvania for dyeing and finishing

acetate goods belonging to customers outside that state with whom the company did most of its business and from and to whom the goods were transported by the company's truck, was held to be engaged in interstate commerce.

In *United States v. Spotless Dollar Cleaners,* 6 F. Supp. 725, 731, 732, clothing was collected in New York and conveyed to a dry cleaning plant in New Jersey and, after being cleaned, was returned to New York. This was held to constitute a service in interstate business. That the case arose under the National Industrial Recovery Act, subsequently held invalid by this Court, does not affect the soundness of the ruling with respect to the interstate character of the business.

In *People v. Vechione,* 276 N. Y. S. 705, 706, 707, clothing was collected in New York City, transported to New Jersey and, after being laundered, was returned to New York City. Laundry service between the states was held to constitute interstate commerce.

In the *Adams Manufacturing Co.* case, 304 U. S. 307, 311, the Court trenchantly pointed out that, as regards interstate commerce, the vice of the Indiana Gross Income Tax Act is "that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce," etc. That this holding applies fully to any "receipts derived from activities in interstate commerce," whether the subject matter of such activities be goods or services, is obvious not only from the Court's language, but also from the United States Supreme Court cases cited in notes 10 and 11 of the opinion. Note 10 relates to the following language (pages 311, 312):

> "We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Section 8 of the Constitution."

Of the twelve cases cited in note 10, nine involved services: broadcasting services, telephone services, personal services, etc. Of those nine decisions, eight invalidated the challenged tax as applied to services in interstate commerce. Clearly, the subject matter of activities in interstate commerce may be goods or services.

The tax in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, was of a wholly different character from the Indiana gross income tax, and, moreover, in that case all the events upon which the tax was conditioned occurred in New Mexico.

Petitioners argue here that all the events from which the tax arose occurred in Indiana, and assert that respondent's receipts were for the enameling, implying thereby that such receipts were solely for the manufacture in Indiana of the hard, finished enamel attached to the metal parts. This argument ignores the realities of the situation. That the customers were billed for the enameling was inserted in the stipulation of facts solely in order to show that the prices billed by respondent did not include the plain metal parts to which the enamel was attached. It is not true, and the stipulation does not mean, that the prices excluded any of the numerous activities which respondent carried on with the customers—negotiation of orders, communication by telephone and telegraph and correspondence, calls at the customers' factories, transportation by respondent's trucks of the metal parts from the customers' factories to

respondent's factory, the manufacture of the hard, finished enamel attached to the metal parts, and the return of the parts in respondent's trucks to the customers' factories. Even petitioners recognize (pp. 3 to 5, their petition) that all such activities were "steps in enameling process of respondent" (p. 3). Obviously, each such activity was a part of the services rendered by respondent, assuming, *arguendo,* that respondent merely rendered services, and of course each was reflected in the prices paid by the customers, just as the wages of the factory workers, the cost of materials, the salaries of executives and other costs of operation were reflected in such prices. That respondent did not charge separately for any such activity makes the cost thereof and the reflection of the cost in the price provided in a particular purchase order no less real.

Petitioners' statements (p. 11, their brief) that they do not tax gross receipts from interstate transportation and that "hence any such receipts would be eliminated before any assessment was made and before litigation was instituted" are wholly inaccurate with respect to the assessment here involved. Whatever may be petitioners' policy (as to which there was no evidence) concerning receipts from interstate transportation, actually, as the Circuit Court of Appeals pointed out and as respondent has stated, the assessment here covered receipts from all the aforesaid activities, including transportation. There was no apportionment whatever.

It is of course true that the manufacture of the hard, finished enamel attached to the metal parts occurred only in Indiana. However, most of, if not all, the aforesaid other activities inextricably connected therewith occurred outside Indiana. Similarly, in the *Adams Manufacturing*

Co. case the goods were manufactured in Indiana but other activities from which the taxed receipts arose occurred outside Indiana. Since the tax included in its measure, without apportionment, receipts derived from activities in interstate commerce, the entire tax fell.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EARL B. BARNES,
ALAN W. BOYD,
CHARLES M. WELLS,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana,
Counsel for Respondent.

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana,
Petitioners,
v.
INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC.,
Respondent.
No. 655.

RESPONDENT'S SUPPLEMENTAL BRIEF

EARL B. BARNES,
ALAN W. BOYD,
CHARLES M. WELLS,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana,
Counsel for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
Of Counsel.

C. E. Pauley & Co., Inc., Indianapolis

BLANK PAGE

INDEX

TABLE OF CASES, STATUTES AND TEXT BOOKS CITED

Cases

Statutes

Constitution

Text Books

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana, *Petitioners,*

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC., *Respondent.*

No. 655.

RESPONDENT'S SUPPLEMENTAL BRIEF

STATEMENT OF CASE

The Facts

The preliminary statement on page 2 of petitioners' brief is correct. Petitioners' statement of the facts, however, (pp. 3-4, their brief) contains certain legal conclusions and omits certain facts.

Respondent owns and operates an enameling factory at Frankfort, Indiana, in which are installed various machines,

ovens, tools and equipment. It manufactures enamel, a vitreous substance composed of fluorspar, cobalt oxide, soda ash, etc., both in a granular form known in the industry as frit, and in a hard, finished form attached to metal articles. In the transactions involved herein the enamel was in the latter form, attached to metal parts used in stoves and refrigerators manufactured by respondent's customers located in Ohio, Michigan, Wisconsin and Illinois. Respondent's traveling salesmen originally solicited and negotiated in said states written purchase orders from such customers, which ordinarily set forth the quantities, specifications and prices of the various items of enameling, and other terms of purchase. The purchase orders forming the basis of the receipts from the transactions involved herein were so obtained or were repeat orders which the customers placed with respondent. After respondent accepted such purchase orders, respondent drove its trucks to the factories of such customers in other states, where the stove and refrigerator parts, of plain unenameled metal, were placed in said trucks and hauled to respondent's plant. After respondent attached hard, finished enamel to such parts respondent hauled them in its trucks back across state lines to the respective plants of such customers for assembly into stoves or refrigerators. Respondent also had its enameling superintendent and other officials call on the customers at said factories from time to time in connection with the customers' enameling problems, carried on extensive communication with its customers by mail, telephone and telegraph in connection with its business with such customers, and received by mail payments of the prices set forth in the purchase orders. The value of the metal parts as a unit, after respondent had attached enamel thereto, was from 2¼ to 3 times the value of the parts theretofore. (R. 20-22.)

The Issue

Petitioners' statements of the issues (pp. 5 and 9 of their brief) are inaccurate. The issue is whether, because of the commerce clause of the Constitution, respondent's aforesaid receipts were not subject to the Indiana Gross Income Tax Act (Chapter 117 of the Indiana Acts of 1937, Sec. 64-2601 et seq. Burns' Ind. Stat. 1933, Pocket Supp. 1940). Said Act was before this court in *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307. Amendments adopted in 1937 are not involved.

SUMMARY OF ARGUMENT

A. Respondent's receipts were from interstate sales of goods because (1) each purchase order, upon acceptance by respondent, constituted a contract for the sale of goods, even though respondent was a bailee of the metal parts; (2) even if each purchase order accepted by respondent be deemed a contract for labor and materials, nevertheless a sale resulted from respondent's delivering to its customers the hard, finished enamel attached to such parts; and (3) even disregarding the purchase orders, respondent's receipts were from sales of goods because respondent furnished the principal material. Such receipts were therefore non-taxable.

B. Such receipts, even if from services, were from interstate commerce. As applied thereto, the tax violates the commerce clause of the Constitution.

ARGUMENT

Petitioners in effect complain of the lower courts' determination of a fact. They urge that such courts erroneously decided that respondent's gross receipts were from activities in interstate commerce, and argue that such receipts were "derived as payment for the services it rendered wholly within Indiana" (p. 9, their brief). Petitioners tacitly concede that receipts derived from activities in interstate commerce are not subject to the tax.

It is respondent's position that (A) the gross receipts were from interstate sales of goods, and (B) even if said receipts were from services, they were from interstate commerce. As applied to such receipts, the tax violates the commerce clause.

A

The Receipts Were From Sales of Goods

1. The accepted purchase orders constituted contracts from which respondent's gross receipts involved herein arose. Although no definition of a sale appears in the Indiana Gross Income Tax Act, a sale of goods is defined in the Uniform Sales Act, in force in Indiana, as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price," (Section 58-101 (2) Burns' Ind. Stats. 1933), a contract to sell goods is defined as "a contract whereby the seller agrees to transfer the property in goods for a consideration called the price," (Section 58-101 (1) Burns' Ind. Stats. 1933) and goods are defined in said act as including "all chattels personal other than things in action and money." (Section 58-606 (1) Burns' Ind. Stats. 1933.) The Uniform

Sales Act was in force in each of the aforesaid states at all times in question. (Sec. 8381 et seq. Throckmorton's 1940 Annotated Code of Ohio; Sec. 9444 et seq. Michigan Compiled Laws of 1929; Sec. 121.01 et seq. Wisconsin Statutes 1939; Chap. 121a Illinois Revised Statutes, 1939.)

In the light of such definitions it is clear that respondent sold the hard, finished enamel to its customers.

Apart from the Uniform Sales Act, each accepted purchase order constituted a contract of sale of goods. There is a valid sale at common law if the following elements are present in the transaction: (1) competent parties, (2) a subject matter or thing sold, (3) price or consideration, and (4) mutual assent or agreement of the parties. See *Cannelton v. Collins*, 172 Ind. 193, 195.

In the case at bar each such element clearly was present. The only element concerning which there can be any possible question is the second, relating to a subject matter. Respondent maintains that the subject matter was enamel manufactured by respondent in its hard, finished form, attached to the metal parts furnished by respondent's customers.

In *National Enameling and Stamping Co. v. New England Enameling Co.*, 151 Fed. 19, a patent case, the court recognized the various forms of enamel and summarized the manufacturing process as follows (page 20):

> "The art of enameling metal is old. Many different formulas and substances are used to form the enamel, but the usual process is substantially as follows: Certain ingredients, usually a mixture of silica or sand, and of other substances having a fluxing property to produce glass when mixed with sand and subjected to heat, are mixed together

> mechanically. This mixture is called by enamelers the 'mix'. The mix is then subjected to a high degree of heat and fused, resulting in a vitrified or glassy mass. This is called the 'frit'. The frit is then put in a mill and ground fine, with a mixture of clay and water, resulting in a liquid paste. This is called the 'dip'. The metal article to be enameled is then dipped in the paste, dried, and subjected to a very high temperature in an oven or muffle. In some cases more than one dipping and burning takes place. The result is, if the operation is successful, a metal article with its surface covered with an adherent coat of metal."

The "adherent coat of metal" which the court mentioned certainly constituted goods. In the National Enameling case the court (page 23) referred to "the burned enamel on the completed article" as a form of enamel to which certain of the claims of the plaintiff therein in question related. In the concurring opinion it was pointed out (page 29) that in the specification the term "enamel" was "applied to the coating in all stages of its manufacture, to the mix, to the molten and ground or pasty mass when ready to be applied as a coating, and to the coating after it had been applied to the metal."

Petitioners have heretofore asserted that the only property furnished by respondent was the granular frit. This is a fundamental error. Respondent's customers gave purchase orders for, and were furnished by respondent, not enamel in the granular form of frit but enamel in the hard, finished form—an adherent coat of metal.

In *W. J. Holliday & Co. v. Highland Iron and Steel Co.*, 43 Ind. App. 342, 347, an accepted purchase order for the furnishing of certain bar iron, setting forth various terms of purchase, was held to constitute a contract for

the purchase and sale of goods, and in *National Hame & Chain Co. v. Robertson,* 90 Ind. App. 556, an accepted purchase order for soft metal bands was recognized by the court as constituting such a contract. The mere fact that the subject matter of the accepted purchase orders in the case at bar was hard, finished enamel instead of bar iron or soft metal bands makes such purchase orders no less contracts for the purchase and sale of goods.

In *Western Leather & Finding Co. v. State Tax Commission,* 87 Utah 227, 48 P. (2d) 526, was involved the question whether delivery of repaired shoes to the owner and receipt of payment therefor constituted a sale of materials used in the repair, under a Utah law imposing a tax upon every retail sale of tangible personal property. Said the court:

> "If the charge made for repairing shoes constitutes a sale by the shoe repairer to the owner of the shoes of the materials used in the repair jobs, then and in such case under the express provisions of the act the plaintiff is not liable for the payment of the tax here sought to be imposed upon it. • • • The mere fact that the leather and other materials here in question were used to make only a part of a shoe does not change the nature of the transaction. A 'sale of goods' is defined as 'an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.' R. S. Utah 1933, 81-1-1. • • • When a shoe repairer delivers the repaired shoes to the owner thereof and receives payment therefor, the title to the materials used in the repair job passes to the owner. The amount paid includes the price of the materials used. Such a transaction possesses all the elements of a sale of the materials used in the repair job." 48 P. (2d) 528.

It will be observed that the foregoing definition of "sale of goods" is that given in the Uniform Sales Act. The court further held wholly immaterial the fact that the shoe repairers did not make separate charges for services rendered and for materials furnished in repairing the shoes. Respondent, in the case at bar, was not required to, and did not, make separate charges for the frit and for the labor necessary to manufacture the hard, finished enamel from the frit. If respondent had sold frit, it would not have made separate charges for the fluorspar, cobalt oxide, soda ash and other raw materials and for the labor required to manufacture the frit, and there was no reason to do so with respect to the manufacture of the final form furnished to the customers.

That the amount of labor, skill and experience required to make tangible personal property is unimportant in determining whether a sale of such property results upon delivery thereof to the person ordering it is borne out in various cases. Thus, in *Cusick v. Commonwealth*, 260 Ky. 204, 84 S. W. (2d) 14, it was held that the furnishing of photographs constituted a sale of tangible personal property at retail. Said the court:

> "Coming to the argument that a photographer is engaged in selling service . . . . it must not be overlooked that the chief value of many articles consists in the cost of the service and skill by which they are produced, rather than the cost of materials out of which they are made. . . . . One who desires a photograph of himself or his family does not contract simply for service. He desires the finished article, and that is what he buys and what the photographer sells. It is true that the photograph is of a particular person, and that the market is limited, but that is more or less true

> in every case where clothing or other articles are made to order for a particular person, or a particular purpose, and are not regularly kept on hand." 84 S. W. (2d) 15.

In *People ex rel. Walker Engraving Corp. v. Graves*, 243 App. Div. 652, 276 N. Y. S. 674, a manufacturer of photo engraving delivered the finished product to the person ordering it as a piece of copper or zinc plate with an etching or photo engraved upon it. The engraving company contended that it was paid for its services and not for the metal delivered, the value of the mere metal being quite small, but the court held that there was a sale of the article and that the proceeds were subject to the retail sales tax. The decision was affirmed on appeal. 268 N. Y. 648, 198 N. E. 539.

In *People ex rel. Foremost Studio v. Graves*, 246 App. Div. 130, 284 N. Y. S. 906, it was held that the furnishing of designs made on paper at the request of customers, used to make a tracing on copper rolls through which fabric was run in order to imprint the figures on cloth, constituted a sale of such designs under a statute imposing a tax upon the privilege of selling tangible personal property at retail. The court said:

> "Here the relator was conducting the business of putting on paper figures or designs, and offering sketches for sale, and each had an intrinsic value, albeit perhaps possessing an artistic quality of principle. . . . . The relator was a purveyor of fabric designs, and its business was not different in principle from those who furnished special thread, implements, or coloring dyes, or engraved plates, to meet the needs of industry." 284 N. Y. S. 908.

That respondent was the bailee of the plain metal parts furnished by the customers clearly did not preclude a sale of the hard, finished enamel manufactured by respondent and attached to the parts. Examples of a bailee's selling tangible personal property attached by him to other property which a customer bailor furnishes are common. If a horse is taken to a blacksmith to be shod, the blacksmith is the bailee of the horse (*Pusey v. Webb* (Del), 47 Atl. 701), but title to the shoes which the blacksmith attaches to the horse's feet passes to the owner of the horse and there is clearly a sale of the shoes. This is true even though the blacksmith makes the shoes. If a man takes his leather shoes to a shoe repairman to have new soles attached, the repairman is the bailee of the shoes. However, there is a sale of the leather which the repairman uses, upon redelivery of the shoes and payment for the repairs. (*Western Leather & Finding Co. v. State Tax Commission*, 87 Utah 227, 48 Pac. (2d) 526). If a man takes his automobile to the garage of a mechanic and leaves it for repairs, the mechanic is the bailee of the automobile (see 6 C. J. p. 1124, section 62), but if the mechanic attaches a new carburetor or a new radiator or other part, there is obviously a sale of the carburetor, radiator or other part when the mechanic redelivers the car to the owner and the owner makes payment to the mechanic. In none of these instances does the bailor customer sell anything to the bailee, and in none of them does the bailee make payment or extend credit to the customer, nor is there a charge made against the bailee, nor, when returned, is any charge made against the customer for the original property. The identity of the original property is not destroyed by the property added by the bailee and in each instance the property returned

is the identical property received from the customer. Nevertheless, there is a sale of the property furnished by the bailee in each instance. In other words, a bailee may clearly sell the property which he, the bailee, furnishes and attaches to the property of the bailor. This is true without reference to the doctrine of accession.

As respondent has shown, the hard finished enamel was a manufactured substance (*National Enameling, etc., Co. v. New England, Enameling Co.*, 151 Fed. 19) and therefore goods just as the horse shoes, shoe leather, carburetor or radiator in the foregoing examples were goods. How much labor in relation to materials was necessary to manufacture these articles is wholly immaterial in determining whether they were goods and how much labor was necessary to manufacture the hard finished enamel, in relation to the value of the raw materials furnished, is likewise wholly immaterial.

2. Each purchase order was necessarily either (1) a contract of sale of personal property or (2) a contract for labor and materials. Respondent has shown that it was the former. However, even if it were the latter, performance of the contract by respondent, including delivery of the hard, finished enamel attached to such parts, and the acceptance thereof and payment therefor by the customer resulted in a sale of such enamel. The question whether a contract is for sale of goods or for labor and materials most frequently arises in determining whether the contract is one for the sale of goods within the Statute of Frauds. Contracts for labor and materials, as distinguished from contracts of sale, have never been within the Statute of Frauds. Prior to the Uniform Sales Act there were various rules in that connection, which are discussed in 27 Corpus Juris, pages 223-235. Sec. 4 (2) of

the Uniform Sales Act, Sec. 58-104 Burns Ind. Stats. 1933 adopts the so-called Massachusetts rule, which is hereinafter set forth. The question regarding the nature of a given contract, with respect to the Statute of Frauds, ordinarily arises only where the party ordering work done, and who may or may not have furnished part of the materials going into the completed article, does not accept the article, actually or constructively, upon completion thereof by the other party. It is well settled under the Massachusetts rule that upon delivery and acceptance of the completed article a sale results. Such rule was first laid down by Chief Justice Shaw in *Mixer v. Howarth,* 21 Pick. 205, 32 Am. Dec. 256. In that case the court said:

> "Where it (the contract) is an agreement with a workman, to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed in future, *it is not a sale until an actual or constructive delivery and acceptance;* and the remedy for not accepting is on the agreement." (Emphasis ours.)

Williston points out that this rule has been followed both in Massachusetts and elsewhere, either exactly or substantially, and cites a long list of cases which have followed the rule. 1 Williston on Sales (2d ed., 1924), sec. 55, note 22.

All the hard, finished enamel involved in the case at bar was accepted by respondent's customers who paid respondent the contract price. Clearly there was a sale of such enamel.

3. From the foregoing, it is plain that respondent was not required to have title to the enameled parts for respondent's transactions to constitute sales of hard, finished enamel. Respondent did have title to the enameled parts, however, even though respondent was not charged with, and did not pay or charge its customers for, the value of the castings and even though redelivery of the parts was contemplated.

In 1 R. C. L., p. 118, sec. 4, the rule is summarized as follows:

> "The rule is universally recognized . . . . . that where the materials of two or more persons are combined into one article, the property in the resulting thing is in the owner of the principal materials which go to make up its whole. Thus, if the materials of one person are united to the materials belonging to another by the labor of the latter, who furnishes the principal materials, the property in the joint product is in the latter by right of accession."

In *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653, the court said that no test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values; and that the question of how much the property or labor of each has contributed to make the improved article what it is must always be one of first importance.

In the case at bar the value of the hard, finished enamel manufactured by respondent exceeded the value of the plain metal parts. It is true that in *Wetherbee v. Green* the disproportion was greater than here, but respondent submits that the relative value test should be applied herein.

B

The Receipts, Even If From Services, Were From Interstate Commerce; As Applied Thereto, the Tax Violates the Commerce Clause

Respondent has discussed this point in its brief (pp. 5-11) in opposition to the petition for certiorari.

Petitioners continue to stress the recitation in the stipulation and finding of facts that respondent billed its customers for "enameling", and contend that therefore respondent's receipts were derived from intrastate and not interstate commerce. This contention was correctly considered by the Circuit Court of Appeals as follows:

> "* * * * the question remains as to whether plaintiff's income received from customers in other states was of an interstate character, which made it immune from taxation. Defendants' argument is predicated upon the theory that the income was received solely from the enameling process performed in plaintiff's Indiana factory. There is some support for this basis in the court's finding of facts, but a reading of the entire findings makes it plain, we think, that the income received was for the total service rendered by the plaintiff, which included the enameling process. Other services which entered into the income were the solicitation of orders by plaintiff's agents, and the execution of contracts, both in other states. Also included in the service was the transportation by plaintiff of the stove and refrigerator parts from points in other states, and the return transportation of such parts by plaintiff after the completion of the enameling process. There was also included, communications by mail, telephone and telegraph between plaintiff and customers located in other states." 114 F. (2d) 891.

The word "enameling" was used by the parties in the sense of including all that was done by respondent in connection with the physical application of the enamel—solicitation and negotiation of orders, transportation by respondent's trucks of the metal parts from the customers' factories to respondent's factory, the manufacture of the hard, finished enamel attached to the metal parts, the return of the parts by respondent in its trucks to the customers' factories, communication by telephone, telegraph and correspondence and calls at the customers' factories from time to time in connection with the customers' enameling problems—and in the sense of excluding the castings.

Petitioners now suggest that they have never "consciously" (p. 7, their brief) taxed receipts from interstate transportation. Actually, the taxed receipts covered all activities of respondent in connection with the furnishing of the hard, finished enamel, including transportation by respondent's trucks. Whether petitioners' inclusion of receipts from respondent's activities outside Indiana in the measure of the tax was done consciously is immaterial. The Indiana Gross Income Tax Act does not purport to provide a method of apportionment and no apportionment was attempted here.

The judgment should be affirmed.

Respectfully submitted,

EARL B. BARNES,
ALAN W. BOYD,
CHARLES M. WELLS,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana,
Counsel for Respondent.

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana, *Petitioners,*

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC., *Respondent.*

No. 655

PETITION FOR REHEARING

EARL B. BARNES,
ALAN W. BOYD,
CHARLES M. WELLS,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana,
Counsel for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
Of Counsel.

C. E. PAULEY & CO., INC.
INDIANAPOLIS

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana, *Petitioners*, v. INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC., *Respondent*. } No. 655

PETITION FOR REHEARING

Comes now the above-named respondent, Ingram-Richardson Manufacturing Company of Indiana, Inc., and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows under Part One the error and the implications of the Court's decision on the merits, and under Part Two the error and the far-reaching implications of the Court's dicta as to the duty of the respondent properly to present the question of apportionment or exclusion to the state administrative officials:

Part One

1. It is obvious in the case at bar that the $5 410 20.00 of gross receipts which were taxed, or used as the measure of the tax, were derived from a *combination* of local activities *and* interstate and out-of-state activities. The local activities consisted of the manufacture of the hard, finished enamel at the respondent's plant in Indiana. The interstate and out-of-state activities consisted, in the main, of sales activities and of transporting the parts to be enameled from points in Illinois, Michigan, Ohio and Wisconsin to the respondent's plant in Indiana, and of transporting the enameled parts from Indiana back to points in Illinois, Michigan, Ohio and Wisconsin. A part of the $5 410 20. represented reimbursement to respondent of the cost of the local activities; a part (and a substantial part) of the $5 410 20. represented reimbursement to respondent of the cost of the interstate and out-of-state activities; and the balance of the $5 410 20. represented profit derived from the *combination* of the various activities. Although the cost of the various activities might be ascertainable with some degree of certainty, it is clear that the amount of profit allocable to the local activities, as distinguished from the amount of profit allocable to the interstate and out-of-state activities, is inherently and practically incapable of determination. Consequently, it is inherently and practically impossible to determine what portion of the total gross receipts of $5 410 20. is allocable to local activities, and what portion thereof is allocable to interstate or out-of-state activities. Neither the Indiana Gross Income Tax Act nor the regulations prescribe any formula for apportionment in cases of this nature. Court decisions do not give the answer.

2. Prior to the decision in the instant case, this Court has always held that a state cannot tax local activities and include in the measure of the tax gross receipts derived from interstate or out-of-state activities. Such a tax has been considered to be a direct tax upon such interstate or out-of-state activities and therefore void under the commerce clause and due process clause in the Federal Constitution. See *James v. Dravo Contracting Company* (1937), 302 U. S. 134, 82 L. Ed. 155; *J. D. Adams Mfg. Co. v. Storen* (1937), 304 U. S. 307, 82 L. Ed. 1365; *Gwin, White & Prince v. Henneford* (1938), 305 U. S. 434, 83 L. Ed. 272; and cases cited.

3. Without purporting to overrule any of its prior decisions, the Court now indicates that a state may tax local activities and include in the measure of the tax gross receipts derived from interstate or out-of-state activities if such activities are but "incident" to the local business. This distinction, of course, raises the very difficult problem of determining in each case which activities are merely "incident" to the local activities, and which activities are not merely incident but are "necessary" to the local activities. Even if the distinction be proper in some cases, it is not valid in the case at bar. It must not be overlooked that the *entire* sum of $5,410.20 was derived *solely from services performed for out-of-state customers.* (R. 20.) Only out-of-state business is involved here. The respondent's business with Indiana customers is not involved.

4. As a necessary and integral part of the out-of-state business from which the respondent received the $5,410.20, the respondent had to transport the parts to be enameled from points outside Indiana to its plant in Indiana, and had to transport the enameled parts from its plant in In-

diana to points outside Indiana. Without these interstate and out-of-state activities there would not have been any out-of-state business and the $5,410.20 would not have been received, or, at least, if the respondent's out-of-state customers had been required to furnish their own transportation, the amount respondent would have received from the out-of-state business would have been substantially less than $5,410.20. It is therefore obvious that the interstate and out-of-state activities were just as necessary an element in the process of realizing the $5,410.20 as were the local activities. These interstate and out-of-state activities can not in any sense be considered to be but "incident" to a local business in so far as the $5,410.20 is concerned. They were "necessary" and "essential," and without them the $5,410.20, or a substantial part thereof, would not have been realized.

5. Cases can be imagined where the costs of the interstate and out-of-state activities equalled such a small percentage of the costs of the local activities that a court would be justified in holding that the interstate and out-of-state activities were too insignificant to require an apportionment. But assume the costs of the interstate and out-of-state activities equalled a substantial percentage—say 10%, 30%, 50%, 75%, 100% or 500%—of the costs of the local activities. Certainly, in any such case the interstate or out-of-state activities could not be regarded as insignificant, or but "incident" to the local activities. In the case at bar, the costs to respondent of the necessary interstate and out-of-state activities were substantial and equalled a substantial percentage of the costs of the local activities. A substantial portion of the $5,410.20 represented reimbursement to respondent for these interstate and out-of-

state activities, and a still larger portion of the $5,410.20 represented reimbursement to respondent for these activities plus the portion of the profit attributable to them.

6. If Indiana can tax these necessary interstate and out-of-state activities, then all other states in which the respondent must perform any part of these necessary activities can impose a like tax. Thus, the respondent would be subjected to the risk of a multiple tax burden to which its competitors whose activities do not cross the state line would not be subjected. In other words, the respondent, *solely because of these necessary interstate and out-of-state activities,* would be subjected to additional tax burdens to which a local business would not be subjected. This constitutes a discrimination against interstate and out-of-state activities prohibited by the Federal Constitution. It was just this type of discriminatory taxation that this Court condemned in the *J. D. Adams Mfg. Co. case* and in the *Gwin, White & Prince case.*

7. It has always heretofore been held that in cases of this nature where the receipts are derived from a *combination* of local activities *and* interstate or out-of-state activities which are inherently and practically incapable of separation, the matter of apportioning the income is purely a legislative function. If the legislature does not see fit to exercise this function and prescribe a formula for apportionment, the administrative officials and the courts are without power to do so, and no part of the income can be taxed. *Meyer v. Wells, Fargo & Co.* (1912), 223 U. S. 297, 56 L. Ed. 445; *J. D. Adams Mfg. Co. v. Storen* (1937), 304 U. S. 307, 82 L. Ed. 1365; *Gwin, White & Prince v. Henneford* (1938), 305 U. S. 434, 83 L. Ed. 272; *Porto Rico Mercantile Co. v. Gallardo* (1925, C. C. A. 1st), 6 F. (2d) 526;

Dravo Contracting Co. v. James (1940, C. C. A. 4th), 114 F. (2d) 242; *Commonwealth v. P. Lorillard Co., Inc.* (1921), 129 Va. 74. It is only where the gross receipts derived from interstate or out-of-state activities are clearly and easily separable from gross receipts derived from the local activities that an exclusion or apportionment can be made without a legislative formula. *Dravo Contracting Co. v. James, supra.* This principle has not been considered to be a serious limitation upon the taxing power of the states because it can be obviated by the state legislatures whenever they, in their judgment and discretion, see fit to exercise their legislative right to prescribe a reasonable formula for apportionment.

8. It must be assumed that the Indiana Legislature knew of this limitation upon its taxing power when it passed the Gross Income Tax Act in 1933 and when it revised the Act in 1937. The Indiana Legislature, for reasons presumably satisfactory to it, has not yet seen fit to exercise this particular legislative function and prescribe a formula for apportionment in cases of this kind. It has always been free to do so in the past and it will be free to do so at any time in the future when it so desires. Certainly, until such time as the Indiana Legislature sees fit to exercise its right to prescribe a formula whereby, in cases of this nature, that portion of the gross receipts derived from local activities can be separated from that portion which is derived from interstate or out-of-state activities, this Court should follow the former decisions and hold that no part of such gross receipts can be taxed. Such a ruling will not impose any serious limitation upon the taxing power of Indiana. It would simply constitute an affirmance of the principle heretofore established, that if Indiana desires to tax that por-

tion of the income which can reasonably be said to be attributable to Indiana activities, her legislature must first prescribe a reasonable formula. In the absence of such a formula, neither the taxpayers, the administrative officials, nor the courts will know how, or have the right or power, to act in the matter of apportionment.

9. For the foregoing reasons it is respectfully urged that this petition for a rehearing should be granted, and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, affirmed; or at least when the cause is remanded to the District Court that such Court be instructed to permit respondent to introduce evidence on the issue of whether respondent's interstate and out-of-state activities were substantial.

Part Two

10. In addition to the decision on the merits, the Court made the following observations with respect to the duty of the respondent to present the question of apportionment or exclusion to the state administrative officials:

> "Moreover, if the transportation of the metal parts were regarded as an item of service for which a deduction should have been allowed, we think that it was the duty of respondent, in view of the fact that it was conducting an intrastate business clearly subject to the tax, to claim the deduction and show the amount which should be allowed. It does not appear that respondent did either. Respondent made its claim for a total exemption from the tax upon the ground that it was laid upon interstate sales, a contention which it has failed to support.

> "The State contends, citing provisions of the taxing act, that the legislature of Indiana contemplated that the taxpayer would reflect in the tax return any deductions claimed, making a separation between taxable and non-taxable items and that the tax return itself provided a method for claiming any deductions to which the taxpayer thought itself entitled. Respondent insists that the Act did not provide a method of apportionment. In the absence of an effort on the part of the respondent to present a claim for deduction and to have the state authorities pass upon the question of deduction or apportionment, as distinguished from its claim for a total exemption, we are not called upon to attempt to resolve the question of state law."

11. Irrespective of what this Court does concerning a rehearing on the merits of this case, the above-quoted observations should be eliminated from its opinion, for the following reasons:

(a) This procedural point was not raised at any time by the petitioners. It was not raised in the trial Court by their answer or otherwise. It was not raised in the Circuit Court of Appeals by the petitioners' statement of points required by Rule 75(d) of the Rules of Civil Procedure for District Courts of the United States (R. 29, 30); or by their briefs in the Circuit Court of Appeals; or by their petition for rehearing in the Circuit Court of Appeals; or in any other manner. It was not raised in this Court by the petitioners' petition for certiorari; or by their specifications of errors or their briefs; or in any other manner. This should be conclusive evidence that the petitioners, themselves, did not deem it necessary or proper for the respondent to present the question of apportionment or

exclusion to the state administrative officials by its tax return or claim for refund.

(b) This procedural point was raised for the first time by the Court, itself, at the close of the oral argument. Pursuant to the request of the Chief Justice, copies of the Act and regulations were filed with the Court. But the application and meaning of the various provisions of the Act and regulations have not yet been fully or adequately argued. Nevertheless, the Court has indicated that it was respondent's duty to take, with the state authorities, steps which the Court has specifically refused to decide whether the Act and regulations provide for.

(c) While it might be reasonable to require a taxpayer who derives gross income from separable interstate or out-of-state transactions, to separate such gross income from income derived from local activities and claim a right to a deduction in his tax return or claim for refund, it is wholly unreasonable to require a taxpayer who derives gross income from a *combination* of local activities *and* interstate or out-of-state activities which are inherently and practically incapable of separation to attempt any exclusion or apportionment. In the absence of a formula prescribed in the taxing law, what formula is the taxpayer going to assert? Is he to apportion his gross receipts according to the relative costs of the various activities; or according to the time devoted to the various activities; or according to the amount invested in the various states where the activities are performed? The taxpayer, administrative officials and the courts are left wholly without a guide of any kind. And what would happen if the taxpayer should assert a method of apportionment which this Court later holds was not the right method? Must the taxpayer

act at his peril? If he asserts the wrong method of apportionment is he to be thereafter foreclosed from resorting to the courts to enforce his claim for refund even though it is just and meritorious? There are no provisions in the Indiana Gross Income Tax Act and no regulations which will even remotely aid the taxpayer with the many problems presented by the Court's decision on the procedural point.

(d) As above pointed out in paragraph 7 of this petition for rehearing, it has heretofore always been held that where the receipts are derived from a *combination* of local activities *and* interstate or out-of-state activities, the matter of apportioning the income is purely a legislative function, and, in the absence of a formula prescribed by the legislature, neither the administrative officials nor the courts have the legal right or power to pass upon the question of apportionment. Under these decisions, taxpayers and their lawyers have justly believed that it was not necessary to present to the Indiana administrative officials the matter of apportionment—a matter with respect to which, under the prior decisions, the administrative officials had no legal right or power to act. As late as May 16, 1937, this Court, in the *J. D. Adams Mfg. Co. case*, which involved the Indiana Act, gave no intimation that it was the duty of the taxpayer to present the question of apportionment or exclusion to the Indiana administrative officials. Indeed, the opinion of this Court in that case indicates quite clearly that no such duty rested upon the taxpayer. If the above-quoted portions of the Court's opinion in the instant case are allowed to remain therein, many taxpayers who have just and valid claims for the refund of taxes that were illegally and unconstitutionally

exacted under the Federal Constitution may, and probably will, be denied relief solely because they and their attorneys relied upon the prior court decisions and did not deem it necessary or proper to present the matter of apportionment or exclusion to the state administrative officials.

(e) A decision by the Court on the procedural point is not necessary to a decision on the merits of the case.

11. For the foregoing reasons it is respectfully urged that, irrespective of what this Court does concerning a rehearing on the merits of this case, the above-quoted portions of the Court's opinion should be eliminated therefrom.

Respectfully submitted,

EARL B. BARNES,
ALAN W. BOYD,
CHARLES M. WELLS,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana,
Counsel for Respondent.

CERTIFICATE OF COUNSEL

I, Earl B. Barnes, counsel for the above-named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EARL B. BARNES,
Counsel for Respondent.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 655.—October Term, 1940.

Department of Treasury of the State of Indiana, et al., etc., Petitioners, *vs.* Ingram-Richardson Manufacturing Company of Indiana, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 5, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Circuit Court of Appeals, affirming the District Court, has held that respondent, Ingram-Richardson Manufacturing Company, is entitled to a refund of a tax levied under the Indiana Gross Income Tax Law,[1] upon the ground of the invalidity of the tax under the commerce clause of the Federal Constitution. 114 F. (2d) 889. We granted certiorari because of an alleged conflict with applicable decisions of this Court. February 3, 1941.

The tax was for $5410.20[2] and was laid upon respondent's gross receipts derived as follows:

Respondent, an Indiana corporation, has a factory at Frankfort in that State where it manufactures enamel, both in a granular form, known as frit, and in a hard, finished form fused with metal articles. In the instant case the enamel was fused with metal parts used in stoves and refrigerators manufactured by respondent's customers in various States other than Indiana. Respondent's traveling salesmen solicited orders from such customers pursuant to which respondent transported by its trucks the stove and refrigerator parts belonging to its customers from their plants to its own plant for enameling. There the enameling was done by the process set forth in the findings, and respondent then hauled the enameled parts back to its customers' factories. Respondent there-

[1] Section 2 of Chapter 50 of the Acts of Indiana of 1933. 11 Burns Indiana Statutes, Sec. 64-2602. See Department of Treasury v. Wood Preserving Corporation, No. 654, decided April 28, 1941.

[2] The suit also embraced a claim for an additional sum of $1154.26 recovery of which was denied below. That claim is not before us.

after billed its customers for the enameling and remittances were made to respondent by mail. The value of the metal parts as units after the completion of the enameling process was from two and one-half to three times the value of the respective parts before the enameling.

Respondent's contention, as set forth in its complaint and as still asserted, is that these transactions constituted sales of the hard, finished enamel in interstate commerce. The Circuit Court of Appeals disagreed with that contention and held that the income in question was derived from services. We are in accord with that view.

In the alternative, respondent contends that the services paid for included the solicitation of orders by respondent's agents and the execution of contracts in other States, interstate communications by mail, telephone and telegraph, and also the transportation by respondent of the stove and refrigerator parts from and to places in other States.

The enameling process was an activity performed at respondent's plant in Indiana and the gross receipts therefrom were taxable by Indiana under its Gross Income Tax Law. See *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, No. 654, decided April 28, 1941. The fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside Indiana did not make the enameling process other than an intrastate activity and any the less a proper subject for the application of the taxing statute. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 253.

But the court below has held that there was included in the service rendered by respondent the transportation by its trucks of the stove and refrigerator parts from and to the customers' plants in other States. The court thought that the reasoning of our opinion in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, applied. That case, however, presented a different situation. The business there was that of a marketing agent for a federation of fruit growers and the state tax was measured by the gross receipts of the taxpayer from the business of marketing fruit shipped from the taxing State to the places of sale in other States and foreign countries. We found that the entire service for which the compensation was paid was "in aid of the shipment and sale of mer-

chandise in that commerce" (interstate and foreign) and hence the service was held to be within the protection of the commerce clause. *Id.*, p. 437. Here, on the contrary, the entire service was in aid of the enameling business conducted within the State. The transportation of the metal parts to and from Indiana were but incident to that intrastate business, as was the circulation of appellants' magazine in States other than the taxing State in the *Western Live Stock* case, *supra*, p. 254.

Moreover, if the transportation of the metal parts were regarded as an item of service for which a deduction should have been allowed, we think that it was the duty of respondent, in view of the fact that it was conducting an intrastate business clearly subject to the tax, to claim the deduction and show the amount which should be allowed. It does not appear that respondent did either. Respondent made its claim for a total exemption from the tax upon the ground that it was laid upon interstate sales, a contention which it has failed to support.

The State contends, citing provisions of the taxing act, that the legislature of Indiana contemplated that the taxpayer would reflect in the tax return any deductions claimed, making a separation between taxable and non-taxable items and that the tax return itself provided a method for claiming any deductions to which the taxpayer thought itself entitled. Respondent insists that the Act did not provide a method of apportionment. In the absence of an effort on the part of respondent to present a claim for deduction, and to have the state authorities pass upon the question of deduction or apportionment, as distinguished from its claim for a total exemption, we are not called upon to attempt to resolve the question of state law.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.